

CLERK'S COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1943

No. 51

LONNIE E. SMITH, PETITIONER,

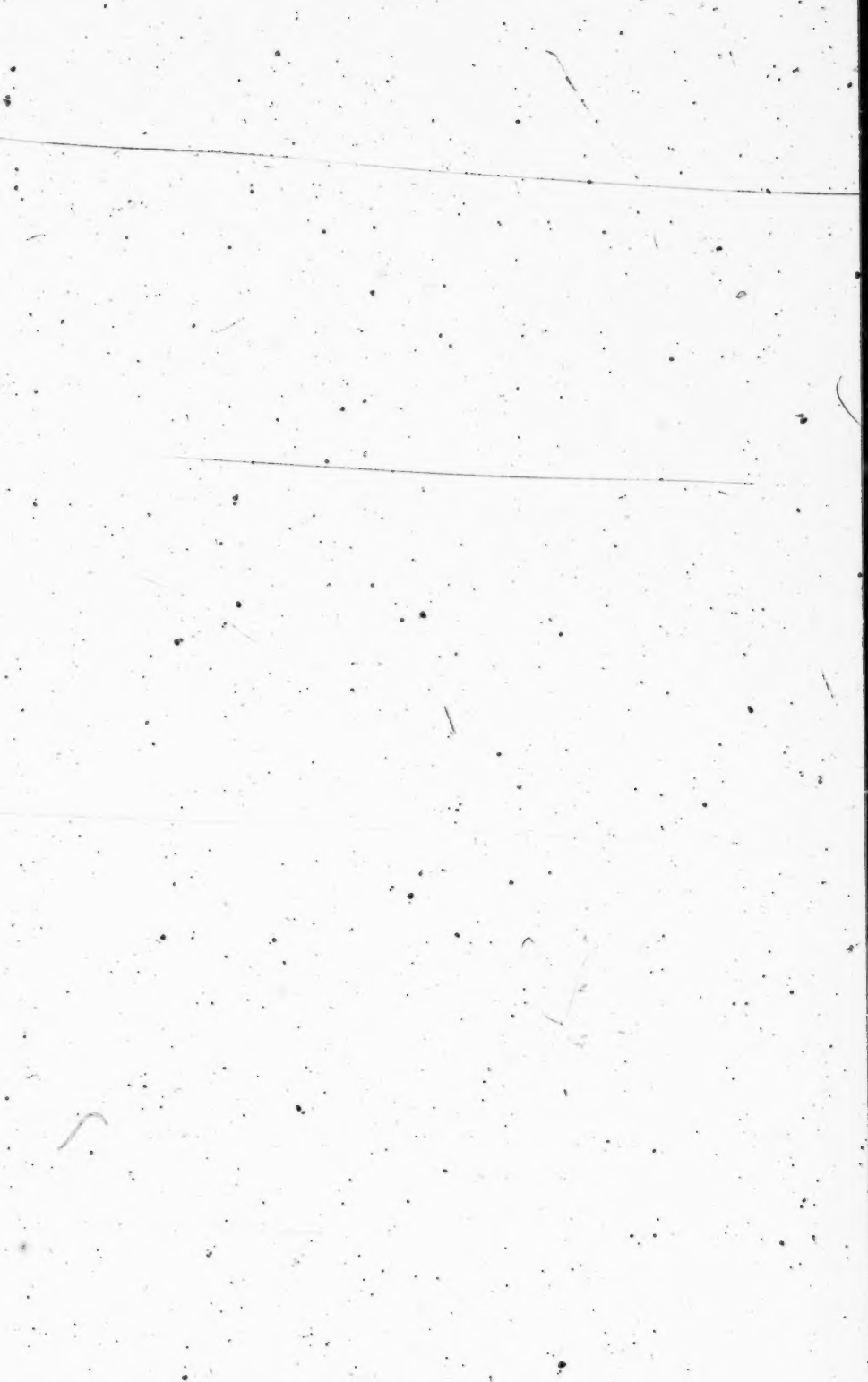
vs.

S. E. ALLWRIGHT, ELECTION JUDGE, AND JAMES
E. LUZZA, ASSOCIATE ELECTION JUDGE, 49TH
PRECINCT OF HARRIS COUNTY, TEXAS

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR HABEAS CORPUS FILED APRIL 11, 1943.

HABEAS CORPUS GRANTED JUNE 2, 1943.



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**DESIGNATION OF CONTENTS OF RECORD ON
APPEAL.**

Filed June 6, 1942.

**IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS,
HOUSTON DIVISION.**

Civil Docket No. 645.

LONNIE E. SMITH,

Plaintiff,

versus

**S. E. ALLWRIGHT and JAMES J. LIUZZA, Election
Judge and Associate Election Judge, 48th Precinct of
Harris County, Texas,**

Defendants.

Plaintiff, Lonnie E. Smith, hereby designates the following portions of the record, proceedings and evidence to be contained in the record on his appeal taken in this cause to the Circuit Court of Appeals for the Fifth Circuit:

1. Plaintiff's Amended Complaint, filed April 25, 1942.
2. Appendixes A, B, C and D of Original Complaint, filed November 15, 1941.
3. Defendants' Amended Answer, filed April 25, 1942.
4. Depositions of E. B. Germany and C. A. Butcher, filed April 25, 1942.

5. Testimony of Charles E. Kamp, filed April 25, 1942.
6. Stipulations of Facts, for both plaintiff and defendant, filed April 25, 1942.
7. Complete Question and Answer Transcript of the evidence as prepared and filed by J. E. McGinness, Official Court Reporter.
8. Plaintiff's Exhibit Number One, filed April 25, 1942.
9. Findings of Facts and Conclusions of Law, filed May 11, 1942.
10. Judgment entered May 30, 1942.
11. Notice of Appeal filed June 5, 1942.
12. Appeal Bond.
13. This designation of Contents of Record and agreement thereto.

Dated this 5th day of June, 1942.

THURGOOD MARSHALL,

(Thurgood Marshall)

W. J. DURHAM,

(W. J. Durham)

H. S. DAVIS, JR.,

(H. S. Davis, Jr.)

Attorneys for Plaintiff-
Appellant.

409 $\frac{1}{2}$ Milam Street,
Houston, Texas.

Service of a true copy of the foregoing designation of contents of record on appeal is hereby acknowledged, and

it is agreed that the foregoing portions of the record, proceedings and evidence in the case constitute all of the record, proceedings and evidence on the trial of the case, omitting only formal matters and repetitions, and the defendants, S. E. Allwright and James J. Liuzza, do not desire to designate any further material to be included in the record.

Signed this 5th day of June, 1942:

GLENN A. PERRY,

(Glenn A. Perry)

Attorney for Defendant.

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CAPTION.

In the District Court of the United States for the Southern District of Texas, Holding Sessions at Houston.

Lonnie E. Smith, Suing on Behalf of Himself and on Behalf of Other Qualified Negro Voters in the State of Texas,
Plaintiff,

vs. Civil Action No. 645.

W. D. Miller, County Clerk of Harris County, Texas, and S. E. Allwright, Election Judge, and James J. Liuzza, Associate Election Judge, 48th Precinct of Harris County, Texas, Defendants.

Be It Remembered, That in the above entitled and numbered cause, lately pending in said Court, in which Final Judgment was rendered at the Regular February, 1942, Term of said Court, to-wit: On May 30, 1942, the Honorable Thomas M. Kennerly, Judge of the District Court of the United States for the Southern District of Texas, presiding, the following proceedings were had; to-wit;

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FIRST AMENDED BILL OF COMPLAINT.

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Filed April 25, 1942.

(Title Omitted.)

To the Honorable Judge of said Court:

Now comes the plaintiff, Lannie E. Smith, suing on behalf of himself and all other qualified Negro voters similarly situated in the State of Texas who are believers in and adherents to the tenets and principles of the Democratic Party, and with leave of the Court first had and obtained, files this, Plaintiff's First Amended Bill of Complaint in lieu of and in substitution of the Original Bill of Complaint heretofore filed in this Cause on the 15th day of November, 1942, and for such Amended Complaint he complains of the defendants, S. E. Allwright, Election Judge, and James J. Liuzza, Association Election Judge, 48th Precinct of Harris County, Texas, acting as administrative officers of the State of Texas, and who unlawfully denied the plaintiff and other qualified Negro voters the right to vote in the statutory Democratic primary election in Texas on July 27, 1940, and August 24, 1940, solely because of race or color; and respectfully shows to this Honorable Court as follows:

1. The jurisdiction of this Court is invoked under subdivision 1 of Section 41 of Title 28 of the United States Code, this being an action at law which arises under the Constitution and laws of the United States, viz., Sections 2 and 4 of Article I, and Amendments Fourteen, Fifteen and Seventeen of said Constitution and Sections 31 and 43 of Title 8 of the United States Code, wherein the matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00. The jurisdiction of this Court is also invoked under subdivision 11 of Section 41 of Title 28 of the United States Code, this being an action to enforce the

right of a citizen of the United States to vote in the State of Texas. The jurisdiction of this Court is further invoked under subdivision 14 of Section 41 of Title 28 of the United States Code, this being an action at law, authorized by law to be brought to redress the deprivation under color of law, statute, regulation, custom and usage of a State of rights, privileges and immunities secured by the Constitution of the United States, viz., Sections 2 and 4 of Article I, and Amendments Fourteen, Fifteen and Seventeen to said Constitution, and of rights secured by laws of the United States, viz., Sections 31 and 43 of Title 8 of the United States Code, all of which will appear more fully hereafter.

2. Plaintiff shows further that this is a proceedings for a declaratory judgment and in injunction under Section 400 of Title 28 of the United States Code (Section 274D of the Judicial Code) for the purpose of determining a question in actual controversy between the parties, to-wit, the question whether the practice of the defendants in enforcing and maintaining the policy, custom and usage by which plaintiff and other Negro citizens similarly situated who are qualified electors and denied the right to cast ballot at the Democratic primary elections in Texas, solely on account of their race or color, violates Sections 2 and 4 of Article I, and Amendments Fourteen, Fifteen and Seventeen to the Constitution of the United States.

3. That all parties to this action, both plaintiff and defendants are citizens of the United States and of the State of Texas, and are resident and domiciled in said State.

4. That the plaintiff, Lonnie E. Smith, is colored, person of African descent and of Negro blood. He is a native born citizen of the United States, is more than twenty-one (21) years of age, has resided in Precinct No. 48 in Harris County, Texas, continuously for a period of more than six

(6) years next preceding the filing of this complaint and has his poll tax receipt for the year of 1939, issued prior to January 31, 1940, as required by the laws of the State of Texas. Plaintiff at all times mentioned herein was and is a duly and legally qualified elector under the Constitution and laws of the United States and of the State of Texas, and is subject to none of the disqualifications provided for voting under the Constitution and laws of the State of Texas or of the United States. Plaintiff is a believer in the tenets of the Democratic Party; plaintiff has never voted for any other candidates than those of the Democratic Party. He was at all times complained of herein and is now ready and willing to take the pledge required by law in Texas of all persons voting in the Democratic Primary elections.

5. That this is a class action authorized by Rule 23-a of the Rules of Civil Procedure of the District Courts of the United States. The rights involved are of common and general interest to the members of the class represented by the plaintiff, namely, Negro citizens of the United States and residents of the State of Texas similarly situated who are duly qualified electors under the Constitution and laws of the United States and of the State of Texas. The members of the class are so numerous as to make it impracticable to bring them all before the Court and for this reason plaintiff prosecutes this action in his own behalf, and on behalf of the class, without specifically naming said members herein.

6. That on the 27th day of July, 1940, a Statutory Democratic primary election was held in the State of Texas, and in Harris County in said State, for nomination of candidates for United States Senator, Members of the United States of Representatives, Governor and other officers pursuant to the mandate of Article 3100, et seq., of the Revised Civil Statutes of Texas. That prior to the 1940 Statutory

Democratic Primary election, defendant S. E. Allwright was duly appointed and qualified as Judge of Elections for Precinct No. 48 in Harris County, Texas, and prior to said election defendant James J. Lianza was duly appointed and qualified as Associate Judge of Elections in Precinct No. 48; both of said defendants were appointed and acted solely under authority of Articles 3104 and 3105 of the Texas Revised Civil Statutes.

7. That the Constitution of the United States secures to qualified voters within the State of Texas the right to cast their ballots at congressional elections. Pursuant to the provisions of Sections 2 and 4 of Article I, and Amendment Seventeen to the Constitution of the United States, the State of Texas has prescribed the qualifications for electors in Article 6 of the Texas Constitution and Article 2958 of the Revised Civil Statutes of Texas. (See Appendix B, attached hereto and prayed to be read as a part hereof.)

8. That in addition, the State of Texas exercising an essential governmental function has established, both by constitutional provisions and statutes, elaborate machinery for the exercise of the elective franchise. Included therein are three steps, namely, the listing of qualified voters, selection of candidates and the general elections. Complete and detailed requirements for the listing of qualified electors and the holding of elections are established by statutes which have been codified in the Revised Civil Statutes of Texas, (Articles 2923-3165). All elections to public office held in the State of Texas are held under the authority of these statutes.

9. Primary elections in Texas were created by statute and have been maintained solely by authority of the statutes of the State of Texas. The present election laws of Texas originated with the so-called "Terrell Law", being

"An Act to regulate elections and to prescribe penalties for its violation (General Laws of Texas, 1903, Chapter 51, p. 133). Sections 82 to 107 of this statute set out the requirements for the holding of primary elections. In 1905 that Statute was repealed and in place thereof Chapter 11 of the General Laws of Texas, 1905, was enacted. These statutes established almost identical requirements for both the "primary" and "general" elections as integral parts of the election machinery for the State of Texas. A comparative table of present election laws is set out in Appendix C, attached hereto and prayed to be read as a part hereof as though set out in full. Since 1905, this legislation has constituted the sole authority for the conduct of all elections, primary, special and general, in the State of Texas.

10. That candidates for the office of United States Senator from Texas can only be placed on the official ballot in the general election after nomination at the statutory primary election. Elections of Senators from Texas to the Congress of the United States are regulated by Articles 3086 to 3089 of the Revised Statutes of Texas, Articles 3089 and 3090, Article 3089 of which provides: "The name of no candidate for United States Senator shall be placed upon the official ballot of any party or of any organization as the nominee of said party or organization for said office unless the said candidate has been duly nominated and selected as herein provided", and, "each party desiring to nominate a candidate for United States Senator shall, if such election is to be held on the first Tuesday after the first Monday in November of any year, nominate or select such candidates at a general primary election to be held throughout the State on the fourth Saturday in July next preceding such election for United States Senator".

11. That Article 3101 of the Revised Civil Statutes of Texas requires that candidates for the United States Con-

gress, Governor, and State officers of political parties that cast one hundred thousand votes or more be nominated in statutory primary elections. The Democratic Party is the only organized political party in Texas that cast more than *one hundred votes* at the last general election prior to July 27, 1940.

12. That since 1859 nominees of the Democratic Party have been elected in all major elections with two exceptions. Tables showing the results of elections in Texas from 1859 to 1940, are filed herewith as Appendix D, and prayed to be read as a part hereof as though set out in full.

13. That pursuant to Chapter 12 and 13 of Title 50 of the Revised Civil Statutes of Texas it was required that the Democratic primary elections be held on the fourth Saturday in July, 1940, and on the fourth Saturday in August, 1940, being respective, July 27, 1940, and August 24, 1940. The holding of this Primary election was mandatory under the laws of Texas as an integral part of the election machinery of the State of Texas and as an essential governmental function of said State of Texas. Article 2956 of the Revised Civil Statutes of Texas authorized absentee voting as in general elections; Articles 2980-2981 specified the form of ballot and the manner of its marking as other articles do for the general elections; Article 2984 fixed the number of ballots to be provided; Articles 2986, 1987, and 2990 permitted the name of the voting booths, guard rails, and ballot boxes which by Articles 2986-2997 of the Revised Civil Statutes of Texas are provided for general elections; Article 2997a, as amended by Acts 1937, ch. 52, makes identical provisions for use of voting machines in both "primary" and "general" elections in Texas; Articles 3003-3-25 provided elaborately for the purity of the ballot box in primary elections; Article 3128 commanded that the sealed ballot boxes be delivered to the defendant as

county clerk after the Primary election as is provided in Article 3028 for general elections; and Articles 3146-3152 conferred jurisdiction of primary election contests upon State District Courts as is provided by Articles 3041-3075 in case of General elections.

14. That defendants S. E. Allwright as Election Judge and James J. Liuzza as Associate Election Judge on July 27, 1940, and August 24, 1940, were appointed, qualified, and acting as administrative officers of the State of Texas solely by virtue of Articles 3104 and 3105 of the Revised Civil Statutes of Texas. Both of said defendants herein, at all times mentioned herein, were State officers within the meaning of the Constitution of the United States. On the above dates the defendants, as Election Judge and Associate Election Judge, were under a positive statutory duty to administer oaths, to preserve order at the election, to appoint special officers to enforce the observance of order and to make arrests, as judges of general elections are authorized and required to do. Defendants Allwright and Liuzza were also required to compel the observance of the law that prohibits loitering or electioneering within one hundred feet of the entrance to the polling place, and to arrest, or cause to be arrested anyone engaged in the work of conveying voters to the polls in carriage or other conveyances, except as permitted by statute. All such police powers are derived from and exercised under the sovereign authority of the State of Texas.

15. That the defendants Allwright and Liuzza as administrative officers of the State of Texas were required to take the same oath as officials of "general elections" pursuant to Article 3104 of the Revised Civil Statutes of Texas which provides in part that: "* * * such presiding judge shall select an associate judge and a clerk to assist in conducting the election; two supervisors may be chosen by any one-fourth of the party candidates, who, with the

judges and clerks, shall take the oath required of such officers in general election * * *." Defendants were under a duty to receive the vote of plaintiff and the votes of all other qualified electors presenting themselves to vote on the dates set for the primary election. Article 217 of the Penal Code of the State of Texas provides: "Any judge of any election who shall refuse to receive the vote of any qualified elector, who, when his vote is objected to shows by his own oath that he is entitled to vote, or who shall refuse to deliver an official ballot to one entitled to vote under the law, or who shall wilfully refuse to receive a ballot after one entitled to vote has legally folded and returned the same, shall be fined not to exceed Five Hundred Dollars." By Article 231 of the Penal Code of the State of Texas the term "election" as used in Article 217 and other articles of Chapter IV thereof, "means any election, either general or special, or primary * * *."

• 16. That Article 2955 of the Revised Civil Statutes of Texas sets forth identical qualifications for voting in both "primary" and "general" elections as follows:

"Qualifications for Voting.—Every person subject to none of the foregoing disqualifications who shall have attained the age of twenty-one years, and who shall be a citizen of the United States, and who shall have resided in this State one year next preceding an election, and the last six months within the district or county in which he or she offers to vote, shall be deemed a qualified elector. The electors living in an unorganized county may vote at an election precinct in the county to which such county is attached for judicial purposes; provided, that any voter who is subject to pay a poll tax under the laws of the State of Texas or ordinances of any city or town in this State shall have paid said tax before offering to vote at any election in this State and holds a receipt showing that said poll tax was paid before the first day of February next preced-

ing such election; and, if said voter is exempt from paying a poll tax and resides in a city of ten thousand inhabitants or more, he or she must procure a certificate showing his or her exemptions, as required by this title.

"If such voter shall have lost or misplaced said tax receipt he or she shall be entitled to vote upon making and leaving with the judge of the elections an affidavit that such tax was paid by him or her, or by his wife or by her husband before the said first day of February next preceding such election at which he or she offers to vote, and that said receipt has been lost or misplaced. In any election held only in a subdivision of a county for the purpose of determining any local question or proposition affecting only such subdivision of the county, then, in addition to the foregoing qualifications, the voter must have resided in said county for six months next preceding such election. The provisions of this article as to casting ballots shall apply to all elections including general, special and primary elections."

17. That the plaintiff Lonnie E. Smith was, on the above-mentioned primary election days, and is, subject to none of the disqualifications of voters, as set out in Section 1 of Article 6 of the Texas Constitution and Section 2954 of the Revised Civil Statutes of Texas, i. e., he was and is over twenty-one years of age; he is not and never has been an idiot or lunatic; he is not and never has been a pauper supported by any county and has never been convicted of any felony. Plaintiff has met all qualifications for voting in the said primary election as set out in Article 2955 of the Revised Civil Statutes of Texas; i. e., he is a native born citizen of the United States, has resided in the State of Texas for more than one year preceding said elections and for more than six months within the district wherein he sought to vote. Plaintiff paid his poll tax prior to January

31, 1940, and holds receipt showing said poll tax was paid prior to January 31, 1940.

18. That pursuant to Article 2975 of the Revised Civil Statutes of Texas the County Collector of Taxes of Harris County, Texas, prepared a list of qualified voters for said County who had paid their poll tax prior to January 31, 1940, which included the name of the plaintiff herein. A copy of this list was, pursuant to Article 3121 of the Revised Statutes of Texas, delivered to the defendants Allwright and Liuzza in the official capacities as Judge and Associate Judge of Primary Elections.

19. That on the 27th day of July, 1940, and on the 24th day of August, 1940, there was held in the State of Texas and in Harris County in said State, a primary election for nomination of Democratic candidates for the United States Senate, House of Representatives and various State offices. Under Article 217 and 231 of the Penal Code of the State of Texas the defendants Allwright and Liuzza were under a duty to deliver an official ballot to all qualified electors who presented themselves at the polling place during the hours that the polling place was open. Plaintiff, on July 27, 1940, and during the regular hours when the polling place at Precinct 48 in Harris County was open on that date, presented his poll tax receipt to defendants Allwright and Liuzza with the request that he be permitted to cast his ballot in said primary election. The defendants refused to give the plaintiff a ballot or to permit him to cast a ballot in said election solely because of the race and color of the plaintiff.

20. That the defendants Allwright and Liuzza conspired with each other and others unknown to deprive the plaintiff and other qualified Negro electors of the State of Texas

of the right to vote in the Democratic primary election held in Harris County, Texas, on July 27, 1940, in violation of the United States Constitution and laws.

21. That the actions of defendants herein in denying to the plaintiff and other qualified Negro electors of the State of Texas the right to vote in the congressional primary for choice of Democratic candidates for Congress was an interference with the effective choice of the voters at the only stage of the election procedure when their choice would have any practical effect on the ultimate result, the choice of United States Senator and a Congressman to represent the district; the denial of this right constituted a denial or abridgement of a right established and guaranteed by the United States Constitution; i. e., Sections 2 and 4 of Article I, and Amendments Fourteen, Fifteen and Seventeen thereto.

22. There is between the parties an actual controversy as hereinbefore set forth.

23. The defendants by their illegal and wrongful acts complained of herein damaged this plaintiff in the sum of and to the extent of Five Thousand (\$5,000.00) Dollars.

24. That plaintiff and others similarly situated and affected, on whose behalf this suit is brought, are suffering irreparable injury and are threatened with irreparable injury in the future by reason of the acts herein complained of; they have no plain adequate or complete remedy to redress the wrong and illegal acts herein complained of other than this action for damages, for a declaration of rights and an injunction; any other remedy to which plaintiff and those similarly situated could be remitted would be attended by such uncertainties and delays as to deny substantial relief, would involve multiplicity of suits, cause

further irreparable injury, damage, vexation and inconvenience to the plaintiff and those similarly situated.

Wherefore, plaintiff respectfully prays the Court that upon filing of this complaint, as may appear proper and convenient to the Court, the Court advance this case on the docket and order a speedy hearing of this action according to law, and upon such hearings.

1. That this Court adjudge and decree, and declare the rights and legal relations of the parties to the subject matter here in controversy, in order that such declaration shall have the force and effect of a final judgment or decree.
2. That this Court enter a judgment or decree declaring that the policy, custom or usage of the defendants, and each of them, in denying plaintiff and other qualified Negro electors the right to vote in Democratic primary elections in Texas, solely on account of their race or color, is unconstitutional as a violation of Sections 2 and 4 of Article I, and Amendments Fourteen, Fifteen and Seventeen of the United States Constitution.
3. That this Court issue a permanent injunction forever restraining and enjoining the defendants, and each of them, from denying qualified Negro elector the right to vote in Democratic primary elections in Texas solely because of color.
4. That the plaintiff have judgment for Five Thousand (\$5,000.00) Dollars damages.
5. That this Court will allow plaintiff his costs herein, and such further, other, additional or alternative relief as

may appear to the Court to be just and equitable in the premises.

LONNIE E. SMITH,
Plaintiff.

W. J. DURHAM,
(W. J. Durham)
Sherman, Texas,
Attorney for Plaintiff.

THURGOOD MARSHALL,
(Thurgood Marshall)
69 Fifth Avenue,
New York, New York.

CARTER W. WESLEY,
(Carter W. Wesley)
2418 Leeland Avenue,
Houston, Texas,

H. S. DAVIS, JR.,
(H. S. Davis, Jr.)
409½ Milam Street,
Houston, Texas,
Of Counsel.

Article 2956. Absentee Voting.

Subdivision 1. Any qualified elector of this State who is absent from the county of his residence, or because of sickness or physical disability cannot appear at the poll place in the election precinct of his residence, on the day of holding any general, special, or primary election, may, nevertheless, cause his vote to be cast at such election in the precinct of his residence by compliance with one or other of the methods hereinafter provided for absentee voting.

Subdivision 2. Such elector shall make application for an official ballot to the county clerk in writing signed by the elector, or by a witness at the direction of said elector in case of latter's inability to make such written application because of physical disability. Such application shall be accompanied by the poll tax receipt or exemption certificate of the elector, or, in lieu thereof, his affidavit in writing that same has been lost or mislaid. If the ground of application be sickness or physical disability by reason of which the elector cannot appear at the polling place on election, a certificate of a duly licensed physician certifying as to such sickness or physical disability shall accompany the application.

Subdivision 3. At any time not more than twenty (20) days, nor less than three (3) days, prior to the date of such an election, such elector making his personal appearance before the county clerk of the county of his residence at his office and delivering to such clerk his application aforesaid, shall be entitled to receive from said clerk one official ballot which has been prepared in accordance with law for use in such election, which ballot is then and there, in the office of said clerk of said county, and in the presence of said clerk and of no other person, except the witness who is authorized to assist elector in certain cases as hereafter provided, to be marked by the elector, or by said witness in case of physical disability of elector, so as to conceal the marking, and same shall, in the presence of the clerk, be deposited in a ballot envelope furnished by said clerk, which envelope shall bear upon the face thereof the name, official title and post office address of such county clerk, and upon the other side a printed affidavit in substantially the following form, to be filled out and signed by the elector; provided, however, that in case of the physical disability of elector preventing him from filling out and signing such affidavit, then the witness who assisted the elector in marking his ballot shall fill out and

sign affidavit for and in behalf of elector and shall also sign his, witness' name, as prescribed in the following form:

State of

County of

I,, do solemnly swear that I am a Resident of Precinct No. in County, and am lawfully entitled to vote at the election to be held in said precinct on the day, 19....; that I am prevented from appearing at the polling place in said Precinct on the date of such election because of (illness), (physical disability), (or because of absence from County), (elector to signify one of the foregoing reasons); that the enclosed ballot expresses my wishes, independent of any dictation or undue persuasion of any person; that I did not use any memorandum or device to aid me in the marking of said ballot.

.....
Signature of Elector,

By

Name of Witness who assisted
elector in event of physical
disability.

Subdivision 4. At any time not more than twenty (20) days, nor less than three (3) days prior to the date of such an election, such elector who makes written application for a ballot as provided for in Subdivision 2 hereof, shall be entitled to have his ballot cast at such an election on compliance with the following provisions:

The application, including fifteen cents (15¢) to cover postage, shall be mailed to the County Clerk of the elector's residence whose duty it shall be forthwith to mail to such elector a blank official ballot and ballot envelope as provided in Subdivision 3, which ballot shall be marked by

elector, or by witness at the direction of said elector in case of the latter's inability to mark such ballot because of physical disability, in the presence of a Notary Public or other persons qualified under the law to make acknowledgments, and in the presence of no other person except said witness and/or such officer, and in such manner that such officer cannot know how the ballot is marked, and such ballot shall then in the presence of such officer be folded by the elector or by said witness in case of physical disability of said elector, deposited in said envelope, the envelope securely sealed, the indorsement filled out, signed and sworn to by the elector, or in case of physical disability, then by the said witness for and in behalf of said elector, and certified by such officer and then mailed by said officer, postage prepaid, to the County Clerk.

Subdivision 5. Upon receipt of any such ballot sealed in its ballot envelope duly indorsed, the clerk shall keep the same unopened until the second day prior to such election, and shall then enclose same together with the elector's application and accompanying papers, in a large or carrier envelope which shall be securely sealed and indorsed with the name and official title of such clerk, and the words "this envelope contains an absentee ballot, and must be opened only at the polls on election day", and the clerk shall forthwith mail same, or deliver it in person, to the presiding judge of election, or to any assistant judge of election, in said precinct.

And ballots mailed out by the county clerk within the legal time, but not received back by him on or before the third day prior to the election on the day of election, shall not be voted, but shall remain in the custody of the county clerk during the thirty (30) day period provided in Subdivision 6.

Subdivision 6. On the day of such election, and in the presence of the election officers, and the supervisors, if any, one of the judges of election shall, between the hours of 2:00 and 3:00 o'clock open the carrier envelope only, announce the elector's name and compare the signature upon the application with the signature upon the affidavit on the ballot envelope. In case the election board finds the affidavits duly executed, that the signatures correspond, that the applicant is a duly qualified elector of the precinct, and that he has not voted in person at said election, they shall open the envelope containing the elector's ballot in such manner as not to deface or destroy the affidavit thereon, take out the ballot therein contained without permitting same to be unfolded or examined and having indorsed the ballot in like manner as other ballots are required to be indorsed, deposit the same in the proper ballot box and enter the elector's name in the poll list the same as if he had been present and voted in person. If the ballot be challenged by any election officer, supervisor, party challenger, or other person, the grounds of challenge shall be heard and decided according to law, including the consideration of any affidavits submitted in support of or against such challenge. If the ballot be admitted, the words "absentee voter" shall be set down opposite the elector's name on the poll list. If the ballot be not admitted, there shall be indorsed on the back thereof the word "rejected", and all rejected ballots shall be enclosed, securely sealed, in an envelope on which words "rejected absentee ballots" have been written, together with a statement of the precinct and the date of election, signed by the judges and clerks of election and returned in the same manner as provided for the return and preservation of official ballots voted at such election. In all cases the application poll tax receipt or exemption certification, ballot envelope and the affidavits and certificates accompanying same shall be returned by the officers of election to the country clerk, who shall keep all such papers except poll

tax receipts and exemption certificates for one (1) year and shall return poll tax receipts and exemption certificates to the voter at any time after the same have been returned to him except in case of challenge when such poll tax receipts and exemption certificates shall be held thirty (30) days and as much longer thereafter as any Court or reviewing authority may direct.

Subdivision 7. Whenever it shall be made to appear to the officers of elections that any elector whose ballot has been marked and forwarded as hereinbefore provided, has since died, then the ballot of such deceased voter shall not be deposited in the ballot box, but shall be returned as in the case of other rejected ballots; provided, however, the casting of the ballot of a deceased voter shall not invalidate the election.

Subdivision 8. The county clerk shall post at a conspicuous place in his office, for public inspection, a complete list of those to whom ballots have been delivered or sent out under this Article, stating thereon the elector's name, age, occupation, precinct of residence and poll tax number or exemption certificate number, and the date on which ballot was delivered or mailed which list shall be kept up from day to day. The applications, poll tax receipts, exemption certificates, or affidavits of loss thereof, shall also be open to public inspection at regular office hours, but under such reasonable rules and regulations as the county clerk may adopt to safeguard the same and to reasonably economize his own time while they are in his keeping.

Subdivision 9. Any of the duties by this Article committed to the county clerk may be performed at the county clerk's office by one or more deputies specially designated in writing by the county clerk to act in connection with the election stated in the appointment.

Subdivision 10. The county clerks, their deputies and officers acting under this Article shall be considered as judges or officers of election within the scope of Articles 215 to 231, inclusive, of the Penal Code of Texas, and all amendments thereto, and be punishable as in said Articles respectively, provided in the case of judges or officers of election. Acts 1905, 1st C. S., p. 520; Acts 1917, 1st C. S., p. 62; Acts 1920, 4th C. S., p. 10; Acts 1921, p. 217; Acts 1923, p. 318; Acts 1931, 42nd leg., p. 180, ch. 105; Acts 1933, 43rd Leg., p. 5, ch. 4; Acts 1935, 44th Leg., p. 700, ch. 300, Section 1; Acts 1935, 44th Leg., 2nd C. S., p. 1700, ch. 437, Section 1.

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APPENDIX "B".

Article 2954. Not Qualified to Vote:

The following classes of persons shall not be allowed to vote in this State:

1. Persons under twenty-one years of age.
2. Idiots and lunatics.
3. All paupers supported by the county.
4. All persons convicted of any felony, except those restored to full citizenship and right of suffrage, or pardoned.
5. All soldiers, marines and seamen employed in the service of the Army or Navy of the United States. Acts 1st C. S. 1905, p. 520.

Article 2955. Qualifications for Voting:

Every person subject to none of the foregoing disqualifications who shall have attained the age of twenty-one years

and who shall be a citizen of the United States, and who shall have resided in this State one year next preceding an election, and the last six months within the district or county in which he or she offers to vote, shall be deemed a qualified elector. The electors living in an unorganized county may vote at an election precinct in the county to which such county is attached for judicial purposes; provided that any voter who is subject to pay poll tax under the laws of this State or ordinances of any city or town in this State, shall have paid said tax before offering to vote at any election in this State and holds a receipt showing that said poll tax was paid before the first day of February next preceding such election; and, if said voter is exempt from paying a poll tax and resides in a city of ten thousand inhabitants or more, he or she must procure a certificate showing his or her exemptions, as required by this title. If such voter shall have lost or misplaced said tax receipt, he or she shall be entitled to vote upon making and leaving with the judge of the election an affidavit that such tax was paid by him or her, or by his wife or by her husband before said first day of February next preceding such election at which he or she offers to vote, and that said receipt has been lost or misplaced. In any election held only in a subdivision of a county for the purpose of determining any local question or proposition affecting only such subdivision of the county, then in addition to the foregoing qualifications, the voter must have resided in said county for six months next preceding such election. The provisions of this article as to casting ballots shall apply to all elections including general, special and primary elections. Act 1st C. S. 1905, p. 520; Acts 1st C. S. 1917, p. 62; Acts 4th C. S. 1920, p. 10; Acts 1921, p. 217; Acts 1923, p. 318.

"APPENDIX C."

Summary and Comparison of Provisions of Revised Statutes of Texas for Elections.

Election Labeled "General Election" and Held November 5, 1940.

1. Held under compulsion of Article 2930 of Revised Civil Statutes of Texas, 1925.
2. Date fixed by Article 2930.
3. Article 2930 fixes time of day for holding election.
4. Article 2939 requires that all election officials shall be qualified voters.
5. Article 2955 fixes same qualifications for voting in this election as in "statutory primary election".

Election Labeled "Primary Election" Held July 27, 1940.

1. Held under compulsion of Article 3101 of Revised Civil Statutes of Texas, 1925.
2. Date fixed by Article 3102.
3. Article 2930 fixes time of day for holding election.
4. Article 2939 requires that all election officials shall be qualified voters.
5. Article 2955 fixes same qualifications for voting in this election as in election labeled "general election".

6. Article 2956 (Absentee Voting) is same for this election for "statutory primary election."
 7. Article 2978 provides that only Official Ballot shall be used.
 8. Articles 2980-2981 provide form of ballots and how to mark ballot.
 9. Article 2984 fixes the number of ballots provided.
 10. Articles 2986, 2987, and 2990 provide for voting booths, guard rails, and ballot boxes for this election.
 11. Article 2998 fixes oath to be taken by officials in this election.
 12. Power of judges fixed by Article 3002 as follows:
6. Article 2956 (Absentee Voting) is the same for this election as for general election.
 7. Article 2978 provides that only official Ballot shall be used.
 8. Articles 3109, 3110 provided form and contents of ballot. Also, Art. 3109 fixes method of marking ballot.
 9. Article 3109 fixes number of ballots to be provided.
 10. Article 3120 provides that voting booths, guard rails, and ballot boxes of "general election," may be used in compulsory statutory primary election.
 11. Article 3104 requires officials of this election to take same oath as officials of "general election".
 12. Power of judges fixed by Article 3105 as follows:

Election Labeled "General Election" and Held
November 5, 1940.

"Judges of election are authorized to administer oaths to ascertain all facts necessary to a fair and impartial election. The presiding judge of election, while in the discharge of his duties as such, shall have the power of the District Judge to enforce order and keep the peace. He may appoint special peace officers to act as such during the election and may issue warrants of arrest for felony, misdemeanor or breach of peace committed at such election, directed to the sheriff or any constable of the county, or such special peace officer, who shall forthwith execute any such warrants, and, if so ordered by the presiding judge, confine the party arrested in jail during the election or until the day after election, when his case may be examined into, before some magistrate, to whom the presiding judge shall report it; but the

Election Labeled "Primary Election" Held
July 27, 1940.

"Judges of primary elections have the authority, and it shall be their duty, to administer oaths, to preserve order at the election, to appoint special officers to enforce the observance of order and to make arrests, as judges of general elections are authorized and required to do. Such judges and officers shall compel the observance of the law that prohibits loitering or electioneering within one hundred feet of the entrance of the polling places, and shall arrest, or cause to be arrested, any one engaged in the work of conveying voters to the polls in carriages or other mode of conveyance, except as permitted by this title."

party arrested shall first be permitted to vote, if entitled to do so, unless he is drunk from the use of intoxicating liquor, then he shall not be permitted to vote until he is sober."

13. Articles 3003 to 3025 contain elaborate provisions for securing purity of the ballot box.

13. Article 3122 provides:

"The same precautions required by law to secure the purity of the ballot box in general election, in regard to the ballot boxes, locking the ballot boxes, sealing the same, watchful care of them, the secrecy in preparing the ballot in the booth or places prepared for voting shall be observed in all primary elections."

14. Article 3028 requires delivery of sealed ballot boxes containing ballots, etc., to County Clerk after this election.

14. Article 3128 requires delivery of sealed ballot boxes containing ballots, etc., to County Clerk after this election.

15. Article 3041 provides for contest of this election before District Court.

15. Article 3146 provides for contest of this election before District Court.

APPENDIX D.

Summary of Election Statistics (a).

Date	Gubernatorial		Senatorial		Presidential	
	Democrats	Others	Democrats	Others	Democrats	Others
1845	9,526	52	.....	.....	.....	.....
1847	13,536	1,231	.....	.....	.....	.....
1848	.....	.....	.....	.....	.....	.....
1849	21,696	.....	.....	.....	10,668	4,509
1851	25,238	3,071	.....	.....	.....	.....
1852	.....	.....	.....	.....	.....	.....
1853	26,515	9,178	.....	.....	13,044	4,995
1855	27,421	17,991	.....	.....	.....	.....
1856	.....	.....	.....	.....	.....	.....
1857	32,552	28,678	.....	.....	31,169	15,639
1859	27,500	36,288	.....	.....	.....	.....
1860	.....	.....	.....	.....	.....	.....
1861	57,343	.....	.....	.....	47,548	15,438
1863	29,966	1,070	.....	.....	.....	.....
1866	49,277	12,168	.....	.....	.....	.....
1869	380	78,993	.....	.....	.....	.....
1872	.....	.....	.....	.....	2,580	114,027

1873	General	150,581	47,719	.....	.....	.....	.....
1876	General	.....	.....	.....	.....	104,803	44,803
1878	General	158,933	78,503	.....	.....	.....	.....
1880	General	166,101	98,103	.....	.....	156,428	85,928
1882	General	150,891	102,835	.....	.....	.....	.....
1884	General	212,234	114,007	.....	.....	225,309	99,996
1886	General	228,776	84,524	.....	.....	.....	.....
1888	General	250,338	98,447	.....	.....	234,883	122,630
1890	General	262,432	79,977	.....	.....	.....	.....
1892	General	323,881	111,586	.....	.....	239,148	183,297
1894	General	216,373	244,498	.....	.....	.....	.....
1896	General	298,528	241,250	.....	.....	375,480	248,878
1898	General	291,548	118,006	.....	.....	.....	.....
1900	General	303,586	145,753	.....	.....	267,337	146,794
1902	General	266,076	90,074	.....	.....	.....	.....
1904	General	206,167	74,244	.....	.....	.....	.....

(a) Sources:

Vote for Governor—Primary, & General Elections—1845-1916—Platforms of Political Parties by Ernest William Winkler; 1916-38—Texas Almanac & Industrial Guide for 1939-40; 1940—Texas Newspapers—Incomplete Returns.

Vote for Senators—Primary Elections—Texas Newspapers, Congressional Directory and Senator Connally's Office—Incomplete Returns; General Elections—1916-18—World Almanac; 1922-36—Congressional Directories; 1940—Comment from Galveston Daily News.

Vote for President—General Elections—1848-1916—Platforms of Political Parties in Texas; 1920—World Almanac 1921; 1924-36—Texas Almanac & Industrial Guide; 1940—Houston Post—Incomplete returns.

For more detailed information refer to footnotes on following tables.

Date		Gubernatorial-		Senatorial		Presidential	
		Democrats	Others	Democrats	Others	Democrats	Others
1906	Primary	294,106	.....	.....	.....	.....	.....
	General	149,105	34,599	.....	.....	.....	.....
1908	Primary	320,067	.....	.....	.....	.....	.....
	General	218,956	81,808	.....	.....	216,737	76,491
1910	Primary	357,380	.....	.....	.....	.....	.....
	General	174,596	44,217	.....	.....	.....	.....
1912	Primary	395,995	.....	317,018	.....	221,589	83,531
	General	233,073	66,664	(b)	.....	.....	.....
1914	Primary	428,620	.....	.....	.....	.....	.....
	General	175,804	34,905	.....	.....	.....	.....
1916	1st Pri.	421,903	.....	386,597	.....	.....	.....
	2nd Pri.	.....	.....	257,280	.....	.....	.....
	General	296,667	66,915	301,757	69,428	285,980	85,741
1918	Primary	678,491	.....	(c)	.....	.....	.....
	General	148,982	28,373	248,742	47,526	.....	.....

(b) Sheppard elected by the legislature to fill vacancy and for full term beginning 3/4/13.

(c) Sheppard's name on primary ballot, but was unopposed. No figures on election in the press.

1920	1st Pri.	449,800	.....	.....	.....	.....	.....
	2nd Pri.	448,777	.....	.....	.....	.....	.....
	General	289,188	192,543	.....	.....	289,688	199,018
1922	1st Pri.	589,926	.....	596,818	.....	.....	.....
	2nd Pri.	.....	.....	553,638	.....	.....	.....
	General	334,199	73,329	264,260	130,744	.....	.....
1924	1st Pri.	703,123	.....	575,042	.....	.....	.....
	2nd Pri.	729,770	.....	.....	.....	.....	.....
	General	422,558	294,970	591,913	101,208	478,425	170,781
1926	1st Pri.	821,234	15,439 (d)	.....	.....	.....	.....
	2nd Pri.	766,318	.....	.....	.....	.....	.....
	General	233,068	32,439	.....	.....	.....	.....
1928	1st Pri.	737,921	.....	581,000	.....	.....	.....
	2nd Pri.	.....	.....	525,825	.....	.....	.....
	General	582,972	124,034	566,139	130,714	341,032	367,967
1930	1st Pri.	833,442	1,964 (e)	651,619	1,758 (e)	.....	.....
	2nd Pri.	857,773	.....	.....	.....	.....	.....
	General	252,738	62,224	266,550	40,151	.....	.....

(d) First state-wide primary held by the Republican Party.

(e) Second Republican Primary—Incomplete returns from 31 Counties only.

Date		Gubernatorial		Senatorial		Presidential	
		Democrats	Others	Democrats	Others	Democrats	Others
1932	1st Pri.	967,490	.....	.....	.....	.....	.....
	2nd Pri.	951,490	.....	.....	.....	.....	.....
	General	528,986	320,552	.....	.....	753,304	101,613
1934	1st Pri.	994,011	..... (f)	662,487	(f)	.....	.....
	2nd Pri.	955,593	.....	.....	.....	.....	.....
	General	421,422	15,655	439,375	15,033	.....	.....
1936	Primary	1,115,485	674,798	.....	.....	.....	.....
	General	782,083	60,132	774,975	62,285	734,485	105,834
1938	Primary	1,115,485	.....	.....	.....	.....	.....
	General	473,526	11,762	.....	.....	.....	.....
1940	Primary	875,520	.....	1,088,346	.....	.....	.....
	General	469,046	19,340	.....	.....	777,193	183,640

(f) Third Republican Primary—No figures listed in papers. Candidates actually selected by State Republican Committee prior to primary, which was held only to comply with state law.

TEXAS GUBERNATORIAL ELECTIONS.

General.

Date	Name	Democrat	Republican	Others	Total
1845*	J. Pinckney Henderson	7,853			
	James B. Miller	1,673			
		<hr/> 9,526	.....	52	9,578
1847	George T. Wood	7,154			
	James B. Miller	5,106			
	Nicholas H. Darnell	1,276			
		<hr/> 13,536	.....	1,231	14,767
1849	P. Hansborough Bell	10,310			
	George T. Wood	8,754			
	John T. Mills	2,622			
		<hr/> 21,696	.....	.....	21,696

*—1845-1916—Vote for Governor—Source: Platforms of Political Parties in Texas—University of Texas Bulletin 1916-No. 63—Ernest William Winkler, Ref. Librarian & Curator of Texas Books, Texas University.

Date	Name	Democrat	Republican	Others	Total
1851	P. Hansborough Bell	13,595			
	M. T. Johnson	5,262			
	John A. Greer	4,061			
	Thomas J. Chambers	2,320			
		<hr/>			
		25,238	2,971	100	28,309
1853	Ben H. Epperson (Whig)				
	Elisha M. Pease	13,091			
	George T. Wood	5,983			
	Lemuel D. Evans	4,677			
	Thomas J. Chambers	2,449			
	John W. Dancy	315			
		<hr/>			
		26,515	9,178	.....	35,693
1855	William B. Ochiltree (Whig)				
	Elisha M. Pease	26,336			
	George T. Wood	276			
	M. T. Johnson	809			
		<hr/>			
		27,421			
	D. C. Dickson (Know-Nothing)			17,965	
				26	45,412

1857	Hardin R. Runnels	32,552			
	Sam Houston (Independent)		28,678	61,230	
1859	Sam Houston (Independent)		36,227		
	Hardin R. Runnels	27,500			
1861	Francis H. Lubbock	21,854		61	63,788
	Edward Clark	21,730			
	Thomas J. Chambers	13,759			
		<hr/>			
		57,343			57,343
1863	Pendleton Murrah	17,511			
	Thomas J. Chambers	12,455			
		<hr/>			
		29,966			
1866	J. W. Throckmorton	49,277		1,070	31,036
	Elisha M. Pease				
1869	Edmund J. Davis (Radical R.)		12,168		61,445
	Andrew J. Hamilton (Conservative R.)		39,901		
			39,092		
			<hr/>		
			78,993		79,373
	Hamilton Steward	380			

Date	Name	Democrat	Republican	Others	Total
1873	Richard Coke	150,581			
	William Chambers		47,719		198,300
1878	Oram M. Roberts	158,933			
	A. B. Norton		23,402		
	W. H. Hamman (Greenback)			55,002	
				99	237,436
1882	John Ireland	150,891			
	George W. Jones (Greenback-Independent)			102,501	
				334	253,725
1884	John Ireland	212,234			
	A. B. Norton		25,557		
	George W. Jones (Independent)			88,450	326,241
1886	Lawrence S. Ross	228,776			
	A. M. Cochran		65,236		
				19,288	313,300
1888	Lawrence S. Ross	250,338			
	Marion Martin (Fusion)			98,447	348,785
1890	James S. Hogg	262,432			
	Webster Flanagan		77,742		
				2,235	342,409

1892	James S. Hogg	190,486			
	George Clark	133,395			
		<hr/>			
		323,881			
	A. J. Houston (Reform R.)	1,322	1,322	110,364	435,467
	.....	1,322			
1894	Charles A. Culberson	216,373			
	W. K. Makemson (Regular R.)	57,147			
	John B. Schmitz (Reform R.)	5,304			
		<hr/>			
		62,451	182,047	460,871	
				
1896	Charles A. Culberson	298,528			
	.....		241,250	539,778	
1898	Joseph D. Sayers	291,548			
	.....		118,006	409,554	
1900	Joseph D. Sayers	303,586			
	R. E. Hanney	112,864			
	.....		32,889	449,339	

Date	Name	Democrat	Republican	Others	Total
1902	S. W. Lanham	266,076			
	George W. Burkett		65,706		
	.....			24,368	356,150
1904	S. W. T. Lanham	206,167			
	James G. Lawden		56,865		
	.....			17,379	280,411
1906	Thomas M. Campbell	149,105	23,771		
	C. A. Atchison (Reorganized)		5,395		
		<hr/>		
	.....		29,166	5,433	183,704
1908	Thomas M. Campbell	218,956			
	John M. Simpson		73,305		
	.....			8,500	300,764
1910	Oscar B. Colquitt	174,596			
	J. O. Terrell		26,191		
	.....			18,026	218,813
1912	Oscar B. Colquitt	233,073			
	C. W. Young		22,914		
	.....			43,750	299,737

1914	James E. Ferguson	175,804	.....	.....	.....
	John W. Philp .....	.....	11,411	.....	.....
	.....	.....	.....	27,494	214,709
1916	James E. Ferguson	296,667	.....	.....	.....
	R. B. Creager .....	.....	49,118	.....	.....
	.....	.....	.....	17,797	363,582
1918**	W. P. Hobby	148,982	.....	.....	.....
	Charles R. Boynton .....	.....	26,713	.....	.....
	.....	.....	.....	1,660	177,355
1920	Pat M. Neff	289,188	.....	.....	.....
	J. G. Culbertson .....	.....	90,217	.....	.....
	.....	.....	.....	102,326	481,731
1922	Pat M. Neff	334,199	.....	.....	.....
	W. H. Atwell .....	.....	73,329	.....	407,528
1924	Mrs. Miriam A. Ferguson	422,558	.....	.....	.....
	George C. Butte .....	.....	294,970	.....	717,528
1926	Dan Moody	233,068	.....	.....	.....
	H. H. Haines .....	.....	31,531	.....	.....
	.....	.....	.....	908	265,507

**—1916-1938—Vote for Governor—Source: Texas Almanac & Industrial Guide—1939-40.

Date	Name	Democrat	Republican	Others	Total
1928	Dan Moody	582,972			
	W. H. Holmes		120,504		
				3,530	707,006
1930	Ross S. Sterling	252,738			
	William E. Talbot		62,224		314,962
1932	Mrs. Miriam A. Ferguson	528,986			
	Orville Bullington		314,807		
				5,745	849,538
1934	James V. Allred	421,422			
	D. E. Waggoner		13,534		
				2,121	437,077
1936	James V. Allred	782,083			
	C. O. Harris		58,842		
				1,290	842,215
1938	W. Lee O'Daniel	473,526			
	Alexander Boynton		10,940		
				822	485,288

1940***	W. Lee O'Daniel	469,046	.....
	George C. Hopkins	19,116	.....
		224	488,386

TEXAS GUBERNATORIAL ELECTIONS.

Democratic Primaries.

Date	Name	First Primary	Second Primary	Total Vote
1906*	Thomas M. Campbell	90,345		
	M. M. Brooks	70,064		
	O. B. Colquitt	68,529		
	Charles K. Bell	65,168		294,106

***—1940—Vote for Governor—Source: Dallas Times-Herald 11/6/40 and Galveston News 11/7/40—Incomplete returns from 252 Counties.

****—From Texas Almanac—1939-40, P. 382—Political Parties in Texas—"The Democratic Party has been dominant in Texas throughout the state's history and has won in all major political contests with the exceptions of the defeat of Hardin R. Runnels (Democrat) by Sam Houston (Know-Nothing) in the gubernatorial contest of 1859, and the defeat in this state of Al Smith by Herbert Hoover in the presidential contest of 1928, and in these instances personal factors rather than political party alignment were responsible for the result. The same can be said of the large vote cast for George C. Butte (Republican) and Orville Bullington (Republican) running against Mrs. Miriam A. Ferguson in 1924, and 1932, respectively. The only serious threat to Democratic control in Texas history was that of the Populist or People's Party, which reached its peak in the election of 1896 when its nominee, J. C. Kearby, lost to Charles A. Culberson by a relatively narrow margin of 298,582 to 238,692."

*—Vote for Governor—1906-38—Source: Texas Almanac & State Industrial Guide—1939-40.

Date	Name	First Primary	Second Primary	Total Vote
1908	Thomas M. Campbell	202,608		
	R. R. Williams	117,459		320,067
1910	O. B. Colquitt	146,526		
	William Poindexter	79,711		
	R. V. Davidson	53,187		
	Cone Johnson	76,050		
	J. Marion Jones	1,906		357,380
1912	O. B. Colquitt	218,812		
	William F. Ramsey	177,183		395,995
1914	James E. Ferguson	237,062		
	Thomas H. Ball	191,558		428,620
1916	James E. Ferguson	240,561		
	Charles H. Morris	174,611		
	H. G. Marshall	6,731		421,903
1918	W. P. Hobby	461,479		
	James E. Ferguson	217,012		678,491
1920	Pat M. Neff	149,818		
	Robert E. Thomason	99,002		
	Joseph W. Bailey	152,340		
	Ben F. Looney	48,640		449,800

	Pat M. Neff	264,075	445,777
	Joseph W. Bailey	184,702	
1922	Pat M. Neff	318,000	
	W. W. King	18,368	
	Fred S. Rogers	195,941	
	Harry T. Warner	57,617	589,926
1924	Felix D. Robertson	193,508	
	George W. Dixon	4,035	
	W. E. Pope	17,136	
	Joe Burkett	21,720	
	Mrs. Miriam A. Ferguson	146,424	
	Lynch Davidson	141,208	
	V. A. Collins	24,864	
	T. W. Davidson	125,011	
	Thomas D. Barton	28,917	703,123
	Mrs. Miriam A. Ferguson	413,751	
	Felix D. Robertson	316,019	729,770
1926	Lynch Davidson	122,449	
	Mrs. Miriam A. Ferguson	283,482	
	Mrs. Kate M. Johnston	1,029	
	Dan Moody	409,732	

Date	Name	First Primary	Second Primary	Total Vote
	Mrs. Edith E. Wilmans	1,580		
	O. F. Zimmerman	2,962		821,234
	Mrs. Miriam A. Ferguson		270,595	
	Dan Moody		495,723	766,318
1928	William E. Hawkins	32,076		
	Dan Moody	442,080		
	Louis J. Wardlaw	245,508		
	Mrs. Edith E. Williams	18,237		737,921
1930	Mrs. Miriam A. Ferguson	242,959		
	Thomas B. Love	87,068		
	Paul Loven	2,724		
	Earle B. Mayfield	54,459		
	Barry Miller	54,652		
	C. C. Moody	4,382		
	Frank Putnam	2,365		
	Clint C. Small	138,934		
	Ross S. Sterling	170,754		
	James Young	73,385		
	C. E. Walker	1,760		833,442
	Ross S. Sterling		473,371	
	Mrs. Miriam A. Ferguson		384,402	857,773

1932

Roger Q. Evans	3,974
Mrs. Miriam A. Ferguson	402,238
C. A. Frakes	2,338
J. Ed. Glenn	2,089
Tom F. Hunter	220,391
Frank Putnam	2,962
Ross S. Sterling	296,383
M. H. Wolfe	32,241
George W. Armstrong	5,312

967,490

473,846

477,644

951,490

45

1934

C. C. McDonald	206,007
James V. Allred	297,656
Clint C. Small	124,206
Edgar Witt	62,208
Edward K. Russell	4,408
Mauzy Hughes	58,187
Tom Hunter	241,339

994,011

497,808

457,785

955,593

Date	Name	First Primary	Second Primary	Total Vote
1936	James V. Allred	553,219		
	P. Pierce Brooks	33,391		
	F. W. Fisher	145,877		
	Tom F. Hunter	239,460		
	Roy Sanderford	81,170		1,053,117
	W. Lee O'Daniel	573,166		
	Ernest O. Thompson	231,630		
	William G. McCraw	152,278		
	Tom F. Hunter	117,634		
	S. T. Brogdon	892		
	Joseph King	773		
	Clarence C. Farmer	3,869		
	P. D. Renfro	8,127		
	Karl A. Crowley	19,753		
	Clarence R. Miller	667		
1940	James A. Ferguson	3,800		
	Thomas Self	1,405		
	Marvin P. McCoy	1,491		1,115,485
	R. P. Condron	2,518		
	Alron B. Davis	3,853		

Miriam A. Ferguson	72,392
Harry Hines	95,285
W. Lee O'Daniel	467,503
Jerry Sadler	48,546
Ernest O. Thompson	185,423
	875,520

TEXAS GUBERNATORIAL ELECTIONS.

Republican Primaries.

Date	Name	Primary Vote	Total Vote
1926	*H. H. Haines	11,215	
	E. P. Scott	4,074	15,289
1930	**K. E. Exum	1,015	
	George C. Butte	670	
	— Grant	263	
	— Gaines	16	1,964
1934	***		

**—Votes for Governor—1940—Source: Dallas Morning News 7/29/40—Incomplete returns from 242 out of 254 Counties.

*—First state-wide primary held by the Republican Party.

**—Figures from the Houston Post 7/29/30—Incomplete returns from 31 Counties.

***—No figures listed in the papers. The Dallas News 7/29/34 states that the Republican Primaries were a formality to conform with Primary Law, since the party polled in excess of 100,000 votes in 1932. Candidates were actually selected by the State Republican Committee prior to primary date.

TEXAS SENATORIAL ELECTIONS.

General.

Date	Name	Democrat	Republican	Others	Total
1916	*Charles A. Culberson	301,757			
	— Atcheson		48,717		
1918	Morris Sheppard			20,711	371,185
	— Flanagan	248,742	36,164		
1922	**Earle B. Mayfield	264,260			
	George E. Peddy (Independent D. & R.)			12,362	297,268
1924	Morris Sheppard	591,913	130,744		395,004
	T. M. Kennerly		101,208		693,121
1928	Tom Connally	566,139			
	T. M. Kennerly		129,910		
				804	696,853
1930	Morris Sheppard	266,550			
	D. H. Haesley		39,047		
				1,104	306,701

*—Vote for Senators—1916-18—Source: World Almanac 1918-21.

**—Vote for Senators—1922-36—Source: Congressional Directories—Statistics.

1934	Tom Connally	339,375	.....	.....	.....
	U. S. Goens .....	.....	12,895	.....	.....
	.....	.....	.....	2,138	454,408
1936	Morris Sheppard	774,975	.....	.....	.....
	Carlos G. Watson .....	.....	59,491	.....	.....
	.....	.....	.....	2,794	837,260
1940	***Tom Connally .....	.....	.....	.....	.....
	George I. Shannon .....	.....	.....	.....	.....

TEXAS SENATORIAL ELECTIONS.

Democratic Primaries.

Date	Name	First Primary	Second Primary	Total Vote
1912	J. F. Wolters	129,740	.....	.....
	Morris Sheppard	154,130	.....	.....
	C. B. Randell	29,635	.....	.....
	Matt Zollner	3,513	.....	317,018

***—Texas papers of November 1940 do not list election returns for Senator irregular tabulations. From the Galveston Daily News, 11/6/40: "Although Senator Tom Connally and several of the congressional delegation had Republican and other opponents, the election bureau did not gather or tabulate returns, so apparent was their election." Senator Connally's office on November 30th had no returns from the general election, the clerk stating that the general election "doesn't count in Texas."

Date	Name	First Primary	Second Primary	Total Vote
1916	Dallas News 7/29/12. (Morris Sheppard elected by the Legislature to fill vacancy to 3/3/13 and for full term beginning 3/4/13.)			
	T. M. Campbell	64,272		
	S. P. Brooks	77,246		
	R. L. Henry	35,753		
	O. B. Colquitt	115,430		
	John Davis	9,919		
	Charles A. Culberson	83,977		386,597
	Dallas News 7/30/16: Incomplete returns from 246 of 253 Counties.			50
	Charles A. Culbertson		163,182	
	O. B. Colquitt		94,098	
	Dallas News 9/3/16: Incomplete returns from 230 of 253 Counties.			257,280
1918	Morris Sheppard			
	Houston Post 7/26/18: Sheppard unopposed. Listed as only candidate in primaries.			

1922

Charles A. Culberson	103,999
James E. Ferguson	131,308
Robert L. Henry	44,624
Earl B. Mayfield	164,910
Clarence Ousley	63,295
Cullen F. Thomas	89,682
	596,813

Congressional Directory, May, 1924
Biography of Senator Mayfield.

James E. Ferguson	249,425
Earle B. Mayfield	304,213
	553,638

Dallas News 8/30/22: Incomplete
returns from 229 Counties of 253.

1924

Fred W. Davis	135,374
John F. Maddox	67,558
Morris Sheppard	372,110
	575,042

Dallas News 8/1/24: Incomplete
returns from 249 of 252 Counties.

1928

Tom Blanton	106,095
Tom Connally	156,291
Minnie Fisher Cunningham	25,915
Earle B. Mayfield	172,272

Date	Name	First Primary	Second Primary	Total Vote
	Jeff McLemore	8,871		
	Alvin M. Owsley	111,456		581,000
	Dallas News 7/31/28: Incomplete returns from 245 of 253 Counties.			
	Tom Connally		290,549	
	Earle B. Mayfield		235,276	525,825
1930	Robert Lee Henry	151,978		
	C. A. Mitchner	35,074		
	Morris Sheppard	464,567		651,619
	Houston Post 7/31/30: Incomplete.			52
1934	Joseph Weldon Bailey, Jr.	246,796		
	Tom Connally	388,516		
	Guy B. Fisher	27,175		662,487
	Dallas News 7/30/34: Incomplete returns from 239 of 254 Counties.			
1936	Richard C. Bush	27,787		
	Joe H. Eagle	90,030		
	Guy B. Fisher	65,825		
	Joseph A. Price	31,301		

J. Edward Glenn 22,189
 Morris Sheppard 437,666

674,798

Houston Post 7/27/36: Incomplete
 returns from 241 of 254 Counties.

A. P. Belcher 66,962
 Tom Connally 923,219
 Guy B. Fisher 98,165

1,088,346

Figures from Senator Connally's Of-
 fice 11/30/40.

TEXAS SENATORIAL ELECTIONS.

Republican Primaries:

Date	Name	Primary Vote	Total Vote
1930	D. J. Haesley	800	
	Harve H. Haines	362	
	..... Harris	596	1,758
	Houston Post 7/29/30: Incomplete returns from 31 Counties.		

1934 Dallas News 7/29/34: The Republican Primaries
 were a formality to conform with Primary Law, since

the Party polled in excess of 100,000 votes in 1932. Candidates actually selected by the State Republican Committee prior to primary date--no figures being listed in the papers.

TEXAS PRESIDENTIAL ELECTIONS.

General.

Date	Name	Democrat	Republican	Others	Total
1848	Lewis Cass	10,668			
X	**Zachary Taylor (Whig)		4,509		15,177
1852	X Franklin Pierce	13,044			
	Winfield Scott		4,995		18,039
1856	X James Buchanan	31,169			
	Millard Fillmore (Know-Nothing)			15,639	46,808
1860	John C. Breckinridge	47,548			
	John Bell (Constitutional Union)			15,438	62,986

*--Vote for President--1848-1916--Source, Platforms of Political Parties in Texas--University of Texas Bulletin 1916--No. 63--Ernest William Winkler--Ref. Librarian & Curator of Texas Books University of Texas.

**--X Indicates successful candidate.

1872	X	Horace Greeley (Liberal Republican)	.....	66,546	.....	.....	.....
		U. S. Grant	.....	47,481	.....	.....	.....
		M. P. O'Connor (Straight)	2,580	.....	.....	116,607	.....
1876		Samuel J. Tilden	104,803	.....	.....	.....	.....
	X	Rutherford B. Hayes	.....	44,803	.....	149,606	.....
1880		Winfield S. Hancock	156,428	.....	.....	.....	.....
		James A. Garfield	.....	57,893	.....	.....	.....
		.....	.....	.....	27,405	241,726	.....
1884	X	Grover Cleveland	225,309	.....	.....	.....	.....
		James G. Blaine	.....	93,141	.....	.....	.....
		.....	.....	.....	6,855	325,305	55
1888		Grover Cleveland	234,883	.....	.....	.....	.....
	X	Benjamin Harrison	.....	88,422	.....	.....	.....
		.....	.....	.....	34,208	357,513	.....
1892	X	Grover Cleveland	239,148	.....	.....	.....	.....
		Benjamin Harrison	.....	81,444	.....	.....	.....
		.....	.....	.....	101,853	422,445	.....
1896		William J. Bryan	380,434	.....	.....	.....	.....
		John M. Palmer (Gold Democrat)	5,046	.....	.....	.....	.....
	X	William J. McKinley	.....	167,520	.....	.....	.....
		.....	.....	.....	81,358	624,358	.....

Date	Name	Democrat	Republican	Others	Total
1900	William J. Bryan	267,337			
X	William J. McKinley		121,173		
				25,621	414,131
1904	Alton B. Parker	167,200			
X	Theodore Roosevelt		51,242		
				15,566	234,008
1908	William J. Bryan	216,737			
X	William Howard Taft		65,602		
				10,889	293,228
1912	Woodrow Wilson	221,589			
X	William Howard Taft		28,853		
				54,678	305,120
1916	Woodrow Wilson	285,980			
X	Charles Evans Hughes		64,673		
				21,068	371,721
1920	***James Cox	229,688			
X	Warren G. Harding		115,640		
				83,378	488,706

1924	**** James Davis	478,425	.....	.....	.....
X	Calvin Coolidge	.....	128,240	.....	.....
		.....	.....	42,541	649,206
1928	Alfred E. Smith	341,032	.....	.....	.....
X	Herbert Hoover	.....	367,036	.....	.....
		.....	.....	931	708,999
1932	X Franklin D. Roosevelt	753,304	.....	.....	.....
	Herbert Hoover	.....	96,682	.....	.....
		.....	.....	4,931	854,917
1936	X Franklin D. Roosevelt	734,485	.....	.....	.....
	Alfred Landon	.....	103,711	.....	.....
		.....	.....	2,123	840,319
1940	X Franklin D. Roosevelt	777,193	.....	.....	.....
	Wendell Willkie	.....	183,307	.....	.....
		.....	.....	333	960,833

****—Vote for President—1924-36—Source: Texas Almanac & Industrial Guide—Years 1926 to 1938.

*****—Vote for President—1940—Source: Houston Post 11/8/40—Incomplete returns from 253 Counties.
 *****—From Texas Almanac—1939-40—P. 382—Political Parties in Texas—"The Democratic Party has been dominant in Texas throughout the state's history and has won in all major political contests with the exceptions of the defeat of Hardin R. Runnels (Democrat) by Sam Houston (Know-Nothing) in the gubernatorial contest of 1859, and the defeat in this state of Al Smith by Herbert Hoover in the presidential contest of 1928, and in these instances personal factors rather than political party alignment were responsible for the result."

TEXAS POPULATION—VOTING AGE.

		White			Free Colored			Slaves		
		Male	Female	Total	Male	Female	Total	Male	Female	Total
Over 20 yrs. of Age	1850	40,670	27,360	67,976	103	90	193	11,895	12,320	24,215
Over 20 yrs. of Age	1860*	106,070	75,446	181,516	78	85	163	37,678	37,272	74,950
		White			Colored					
		Male	Female	Total	Male	Female	Total			
	1870*	132,390	108,960	241,350	51,575	51,310	.....		
	1880**	303,154	237,827	540,981	82,622	82,070	.....		
	1890**	445,183	358,867	804,050	104,430	101,686	.....		
	1900**	621,109	532,856	1,153,965	141,413	139,185	.....		
		White			Negro			Other Races		
		Male	Female	Total	Male	Female	Total	Male	Female	Total
Over 21 yrs. Table #4.....	1910	864,147	753,971	1,618,118	171,944	169,690	341,634	368	202	1,070
Population Bulletin	1920	1,086,862	957,408	2,044,270	196,055	188,373	384,428	1,495	522	2,017
Texas-Census Bureau	1930	1,253,035	1,177,398	2,430,433	234,459	253,178	469,637	169,101	151,629	320,810

*—Indians included in "White".

**—Japanese, Chinese & Civilized Indians included in "Colored".

TEXAS POPULATION—VOTING AGE.

White			Free Colored			Slaves			Non-White	All Classes
Male	Female	Total	Male	Female	Total	Male	Female	Total	Total	Total
40,670	27,360	67,976	103	90	193	11,895	12,320	24,215	24,408	92,384
106,070	75,446	181,516	78	85	163	37,678	37,272	74,950	75,113	256,629
White			Colored						Non-White	All Classes
Male	Female	Total	Male	Female	Total					
132,390	108,960	241,350	51,575	51,310	.....	.....	.....	.....
303,154	237,827	540,981	82,622	82,070	.....	.....	.....	.....
445,183	358,867	804,050	104,430	101,686	.....	.....	.....	.....
621,109	532,856	1,153,965	141,413	139,185	.....	.....	.....	.....	280,598	1,434,563
White			Negro			Other Races			Non-White	All Classes
Male	Female	Total	Male	Female	Total	Male	Female	Total		
864,147	753,971	1,618,118	171,944	169,690	341,634	368	202	1,070		
1,086,862	957,408	2,044,270	196,055	188,373	384,428	1,495	522	2,017		
1,253,035	1,177,398	2,430,433	234,459	253,178	469,637	169,101	151,629	320,810		
									342,704	1,960,822
									386,445	2,430,715
									790,447	3,220,880

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Filed April 25, 1942.

**DEFENDANT'S ANSWER TO FIRST AMENDED BILL
OF COMPLAINT.**

(Title Omitted.)

To the Honorable Judge of said Court:

Come now the defendants, S. E. Allwright and James J. Liuzza, Election Judge and Associate Election Judge for the 48th voting precinct in Houston, Harris County, Texas, in the above entitled and numbered cause, and with leave of the Court first had and obtained files this their first amended answer to Plaintiff's First Amended Bill of Complaint, respectfully represent to the Court:

I.

In answer to lines 1, 2, 3 and part of 4 of the Plaintiff's First Amended Bill of Complaint, defendants especially deny that he is suing on behalf of all qualified Negro voters similarly situated in the State of Texas, who are believers and adherents of the tenets and principles of the Democratic Party. Defendants respectfully aver that plaintiff is suing entirely for himself.

II.

In answer to parts of line 10 and 11 of Plaintiff's First Amended Bill of Complaint, Defendants deny that they are appointed, qualified and acting as administrative officers of the State of Texas, etc., in answer to part of 11 to 14 inclusive, Defendants deny that unlawfully denied to Plaintiff and all other qualified Negro voters the right to vote in the statutory Democratic primary elections in Texas on July 27th, 1940, and August 24th, 1940, solely because of race or color. Defendants respectfully repre-

sent that they are not public officers, but are Democratic Party officials, and denied plaintiff of the right to vote in said Democratic primary election solely because of the mandatory instructions of the Democratic Party, more particularly and fully set out and described in paragraph numbered XXIII hereof.

III.

In answer to paragraph 1, beginning on the first page of Plaintiff's First Amended Bill of Complaint, Defendants deny that the jurisdiction of this Court is invoked under subdivision 1 of Section 41 of Title 28 of the United States Code. Defendants further deny that the jurisdiction of this Court is invoked under Sections 31 and 43 of Title 8 of the United States Code, in that the matter in controversy herein does not exceed, exclusive of interests and costs, the sum of \$3,000.00. The defendants further deny that the jurisdiction of this Court is also invoked under subdivision 11 of Section 41 of Title 28, or subdivision 14 of Section 41 of Title 28, of the United States Code because this is alleged an action to enforce the right of a citizen of the United States to vote in the State of Texas. Defendants respectfully represent that the allegations referred to in Plaintiff's First Amended Bill of Complaint are primary elections in which a political party has a right to prescribe qualifications for membership and participation therein, and is not an election within the intent and meaning of the Fourteenth, Fifteenth, and Seventeenth Amendments to the Constitution of the United States.

IV.

Defendants especially deny in answer to paragraph 2 of Plaintiff's Amended Bill of Complaint that this is a proceeding for a declaratory judgment and an injunction.

under Section 274D of the Judicial Code (United States Code, Title 28, Section 400), because it appears from the face of the plaintiff's First Amended Bill of Complaint that this is, in truth and in fact, a suit for \$5,000.00 damages against each of the Defendants, and an action herein for alleged relief by injunction would be moot at this time in view of the fact that the face of Plaintiff's First Amended Bill of Complaint shows that the elections occurred on July 27th, 1940, and August 24th, 1940. Defendants further deny that Plaintiff herein and the other Negro citizens similarly situated are qualified members of the Democratic Party and entitled to participate in the Democratic primary elections.

V.

Defendants especially deny so much of paragraph No. 4 of Plaintiff's First Amended Bill of Complaint as relates that "Plaintiff is a believer in the tenets of the Democratic Party". Defendants more especially deny that plaintiff is or ever has been a member of the Democratic Party or that he can become such or is entitled to membership therein, all as is more fully shown in paragraph No. XXIII hereof.

VI.

Defendants especially deny the allegations set out in paragraph 5 of Plaintiff's First Amended Bill of Complaint in that this is not such a suit as is of common and general interest of the members of the class represented by the Plaintiff, namely, Negro citizens of the United States and residents of the State of Texas, similarly situated, etc., in that the elections referred to in Plaintiff's First Amended Bill of Complaint were Democratic Party primaries, and not an election within the intent and mean-

ing of the Fourteenth, Fifteenth and Seventeenth Amendments to the Constitution of the United States.

VII.

In answer to paragraph 6 of Plaintiff's First Amended Bill of Complaint, Defendants especially deny that the elections referred to were statutory elections or were held pursuant to the mandate of Article 3100 et seq. of the Revised Civil Statutes of Texas; Defendants especially deny that they were appointed and acting solely under authority of Articles 3104 and 3105 of the Texas Revised Civil Statutes.

VIII.

In answer to paragraph No. 7 of Plaintiff's First Amended Bill of Complaint, Defendants especially deny that the elections referred to in Plaintiff's First Amended Bill of Complaint are elections within the intent and meaning of Sections 2 and 4 of Article 1 and Amendment Seventeen to the Constitution of the United States, or in Article 6 of the Texas Constitution and Article 2955 of the Revised Civil Statutes of Texas.

IX.

In answer to paragraph 9 of Plaintiff's First Amended Bill of Complaint, Defendants deny that the Democratic primaries are maintained solely by authority of the statutes of the State of Texas, because the holding of such primary election is in truth and in fact a political party affair.

X.

In answer to paragraph No. 10 of Plaintiff's First Amended Bill of Complaint, Defendants especially deny

that candidates for the office of United States Senator from Texas can only be placed on the official ballot in the general election after nomination at statutory primary elections.

XI.

In answer to paragraph No. 11 of Plaintiff's First Amended Bill of Complaint, Defendants especially deny that Article 3101 of Revised Civil Statutes of Texas require that candidates for the United States Congress, Governor and State officials of political parties that cast 100,000,000 votes or more be nominated in statutory primary elections apply in that any attempt to manage or control the party affairs of a political party, and more especially the Democratic Party, is unauthorized and of no effect.

XII.

In answer to paragraph No. 13 of Plaintiff's First Amended Bill of Complaint, Defendants especially deny that the holding of the primary elections under the laws of the State of Texas is an essential governmental function of the State of Texas, because the holding of such primary elections is in truth and in fact a political party affair, and the nominees of such elections have no standing of any nature or kind in governmental affairs unless and until they are elected by all qualified voters at a general election, at which said election the Plaintiff herein and all others similarly situated have the right to participate and exercise their right of suffrage.

XIII.

In answer to paragraph 14 of Plaintiff's First Amended Bill of Complaint, Defendants especially deny that they

were acting as Judge and Associate Judge of Precinct No. 48 of Harris County, Texas, solely by virtue of the laws of Texas, as administrative officers of the State of Texas. Defendants respectfully represent to the Court that they were Democratic Party officials and that they were acting in their capacity of Judge and Associate Judge of Precinct No. 48 of Harris County, Texas, at the times and place related in Plaintiff's First Amended Bill of Complaint upon the instructions of the Democratic Party, as is more fully set out in paragraph No. XXIII herein, and independently of any statute of the State of Texas.

XIV.

Defendants further especially deny so much of paragraph 15 of plaintiff's First Amended Bill of Complaint as relates "defendants were administrative officers of the State of Texas" and "defendants were under a duty to receive the vote of Plaintiff and the votes of all other qualified electors presenting themselves to vote on the dates set for the primary election", because the elections complained of were primary elections and not elections within the intent and meaning of the Fourteenth and Fifteenth and Seventeenth Amendments of the United States, and the Defendants were following the mandatory instructions of the Democratic Party at the same time, all as is more fully set out in paragraph No. XXIII herein.

XV.

Defendants especially deny, in answer to paragraph No. 19 of the Plaintiff's First Amended Bill of Complaint, that they were acting as Judge and Associate Judge of Precinct 48 of Harris County, Texas, solely by virtue of the laws of Texas, as administrative officers of the State of Texas, or that they were under a duty to deliver an official ballot to all qualified electors who presented themselves at the vot-

ing place during the hours that the voting place was open, or that Plaintiff was denied a ballot to said Democratic primary election solely because of his race or color. Defendants respectfully represent to the Court that they were acting in their capacity of Judge and Associate Judge of Precinct No. 48 of Harris County, Texas, at the times and place related in Plaintiff's First Amended Bill of Complaint upon the instructions of the Democratic Party, as is more fully set out in paragraph XXIII herein, and independently of any statute of the State of Texas.

XVI.

In answer to paragraph No. 20 of Plaintiff's First Amended Bill of Complaint, Defendants deny that they conspired with each other and others unknown to deprive the Plaintiff and other qualified Negro electors of the State of Texas, of the right to vote in the Democratic primary election held in Harris County, Texas, on July 27th, 1940, in violation of the United States Constitution and law, but that these Defendants were following the mandatory instructions of the Democratic Party at such times, as is more fully set out in paragraph No. XXIII herein.

XVII.

In answer to paragraph No. 21 of Plaintiff's First Amended Bill of Complaint, Defendants especially deny that Defendants, at the times and place set out in Plaintiff's First Amended Bill of Complaint, were acting as administrative officers of the State of Texas, or that the refusal to permit the Plaintiff at the times and place set out in his First Amended Bill of Complaint constitutes a denial or abridgment of the right of the United States citizen to vote within the meaning of Sections 2 and 4 of Article 1, and Amendments Fourteen, Fifteen and Seventeen thereto of the Constitution of the United States en-

acted pursuant thereto. Defendants respectfully represent to the Court that they were not administrative officers of the State of Texas, but, to the contrary, were party officials of the Democratic Party of the State of Texas, at the times and place referred to in Plaintiff's First Amended Bill of Complaint.

XVIII.

In answer to paragraph No. 22 of Plaintiff's First Amended Bill of Complaint, Defendants especially deny that there is an actual controversy between the parties hereto, but respectfully aver that the identical matter of this suit has been previously disposed of by this Court in civil action No. 20 and civil action No. 449 and by the Supreme Court of the United States in the case of *Grovey vs. Townsend*, 295 U. S. 45, in each of which cases the alleged relief sought by the Plaintiff herein has been denied to other Plaintiffs under identical set of facts. Defendants respectfully represent to this Court that the Plaintiff herein has filed this suit, not because he seeks an adjudication of any right to which he might believe himself legitimately entitled, but only to continue a harrassment of the Democratic Party of Texas, its officials, and more especially, the defendants herein.

XIX.

In answer to paragraph No. 23 of Plaintiff's First Amended Bill of Complaint, Defendants especially deny that the failure of Defendants to permit them to vote at the primary election therein referred to, or to permit Plaintiff to become a member of the Democratic Party, or engage in its activities, deprives them of any right, power or privilege to vote. Defendants respectfully represent to the Court that a primary election, and more specifically, the election referred to in Plaintiff's First Amended Bill of

Complaint, is not an election within the intent and meaning of the Fourteenth, Fifteenth and Seventeenth Amendments to the Constitution of the United States. Defendants further deny that any such alleged deprivation damaged plaintiff in the sum of \$3,000.00, or any other sum of money, or other thing of value.

XX.

In answer to paragraph 24 of Plaintiff's First Amended Bill of Complaint, Defendants especially deny that Plaintiff and those on whose behalf this suit is brought, are suffering irreparable injury and are threatened with irreparable injury in the future, or that they have no plain, adequate or complete remedy or redress; Defendants allege that the actions as complained of herein are the actions of the Democratic Party of the State of Texas, of which this Plaintiff and those in whose behalf he sues are not members, and that Plaintiff, together with those in whose behalf he sues, are not entitled to a declaration of rights and injunction.

XXI.

Defendants respectfully represent to the Court that the elections referred to in Plaintiff's First Amended Bill of Complaint are Democratic Party primary affairs; that the costs thereof were borne altogether by the Democratic Party in Texas, the funds therefor being secured from the individual members of the Democratic Party who sought the nomination of their party for the respective offices to which they hoped to become elected at a general election held subsequently to the primary election referred to in Plaintiff's First Amended Bill of Complaint, namely, November 5th, 1940, at which said general election the Plaintiff herein and all others similarly situated had the opportunity to exercise their right to vote if he and they elected

to do so, in which latter case the right was guaranteed to him and them under the Fourteenth, Fifteenth and Seventeenth Amendments to the Constitution of the United States.

XXII.

Defendants further respectfully represent to the Court that any attempt by or on the part of the legislature of the State of Texas to manage or control the party affairs of a political party, and more especially the Democratic Party, is unauthorized and of no effect, for the reason that the Democratic Party of Texas is a group of persons possessing a common political belief, who voluntarily associated or banded themselves together for the purpose of electing one of their number to be voted for or against in a general election, which was held in the City of Houston, Harris County, Texas, on the 5th day of November, A. D. 1940, at which said general election the Plaintiff and all other qualified electors under the laws of the United States and the State of Texas had the right to participate if they elected to do so.

XXIII.

Defendants respectfully represent to the Court that the Democratic Party of Texas is a political party composed of a voluntary association of persons who have common political ideas; that the Democratic Party of Texas in convention assembled at Houston, Texas, on May 4th, 1932, unanimously adopted the following Resolution:

"Be It Resolved, that all white citizens of the State of Texas, who are qualified to vote under the Constitution and laws of the State, shall be eligible to membership in the Democratic Party and as such entitled to participate in its deliberations."

Defendants respectfully represent to the Court that Plaintiff, and all others similarly situated cannot comply with those prerequisites and the Democratic Party of the State of Texas has never annulled, abrogated or amended said resolution, and it is, therefore, in full force and effect; that there is only one Democratic Party in the State of Texas; that the Democratic Party of Harris County, Texas, is a part and subdivision of the Democratic Party of the State of Texas, which passed the resolution herein set out, and that the Democratic Party of Harris County, Texas, received its authority to conduct its affairs, including the holding of primary elections referred to in Plaintiff's First Amended Bill of Complaint, from the Democratic Party of the State of Texas; that Defendants herein were bound to refuse to permit the Plaintiff herein the right to participate in the Democratic primary election referred to in Plaintiff's First Amended Bill of Complaint by the mandate of the resolution herein referred to.

XXIV.

Defendants are not seeking to deprive the plaintiff and all others similarly situated from participation in any election within the intent and meaning of the Fourteenth, Fifteenth and Seventeenth Amendments to the Constitution of the United States; that they are officials of a private organization voluntarily formed for the purpose of expressing political ideas and ideals; that neither they nor the members of the political party could elect anyone to any office by virtue of the primary elections referred to in Plaintiff's First Amended Bill of Complaint in that said primary elections were conducted only for the purpose of nominating persons to the several positions which were voted on by all qualified electors, including Plaintiff and all others similarly situated, at the general election which was held in Houston, Harris County, Texas, on the 5th day of November, 1940, the expense of which said general

election was borne by Harris County, Texas, with public funds, provided all said qualified electors exercise their right to participate in said general election.

Wherefore, premises considered, Defendants pray the Court that Plaintiff be denied all the alleged relief he seeks in his petition; that Defendants have their costs in this suit expended; that they have such other and further relief, in law and in equity, to which they may be justly entitled.

Respectfully submitted,

S. E. ALLWRIGHT,

.....
Defendants.

GLENN A. PERRY,

Attorney for Defendants.

GLENN A. PERRY,

(Glenn A. Perry)

Of Counsel.

Attorney for Plaintiff:

H. S. DAVIS, JR.,

409½ Milam Street,

Houston, Texas.

Attorney for Defendants:

GLENN A. PERRY,

510 State National Bank Building,

Houston, Texas.

Before me, the undersigned authority, on this day personally appeared S. E. Allwright and James J. Liuzza, each of whom being first by me duly sworn, on his oath for himself says that he is one of the Defendants in the foregoing petition; that he has for himself read the foregoing petition

and knows of his own knowledge that the facts therein stated are true and correct.

S. E. ALLWRIGHT,
.....

Sworn to and subscribed before me, the undersigned authority, on this, the day of April, A. D. 1942.

.....
Notary Public, Harris
County, Texas.

48

STIPULATION OF FACTS.

Filed April 25, 1942.

(Title Omitted.)

For the purpose of the record herein, it is stipulated by and between the parties plaintiff and defendants hereto as follows:

1. That all parties to this action, both plaintiff and defendants are citizens of the United States and of the State of Texas, and are residents and domiciled in said State.

2. Plaintiff is a Negro, a native born citizen of the United States residing in Houston, Harris County, Texas, more than 21 years of age. He has resided more than 5 years in the 48th Precinct of Harris County, Texas. He has a poll tax receipt, issued prior to January 31, 1940, as required by law; Plaintiff is and has been a duly and legally qualified elector under the laws of the United States and the State of Texas, and is subject to no disqualification.

Plaintiff is a believer in the tenets of the Democratic Party. Plaintiff has never voted for any other candidate, than those of the Democratic Party, in any General Election at all times material to this case; has been and is ready and willing to take the pledge of persons voting in the Democratic Primary.

3. On July 27, 1940, a Primary was held in Harris County, Texas, and on August 24, 1940, a "run off" Primary for nomination of candidates upon the Democratic ticket for offices of U. S. Senator, Congressman, Governor and other State and Local officers. Prior to this time the defendants were appointed and qualified as Presiding Judge and Associate Judge of Primaries in Precinct 48, Harris County, Texas.

4. At all times material herein the only State-wide primaries held in Texas have been for Nominees of the Democratic Party.

5. Since 1859 all Democratic nominees, for Congress, Senate and Governor, have been elected in Texas, with two exceptions.

6. The Harris County Tax Assessor and Collector prepared a list of qualified voters, including plaintiff, and delivered a copy of this list to the defendants prior to July 27, 1940, without expense to either candidates, the Democratic Party or any officers thereof.

7. That the County Clerk of Harris County, Texas, issues and receives absentee ballots for the Democratic Primaries. That the assistants to the County Clerk for Harris County, Texas, during the period of from 20 days to 3 days prior to July 27, 1940, issued and received absentee ballots for the Democratic Primary. That the said County Clerk for Harris County, Texas, also receives absentee

ballots for General Elections, School District Elections, City of Houston Elections and other District Elections.

8. That on July 27, 1940, plaintiff presented himself to vote, in the said Democratic Primary, at the regular polling-place for the 48th Precinct with his poll tax receipt and requested to be permitted to vote. Defendants refused him a ballot, because of his race and color, in accordance with the instructions of the Democratic Party of Texas.

9. That the County Clerk, the Tax Assessor and Collector, the County Judge of Harris County and the Secretary of the State of Texas all have performed their duties under Articles 3100-3153, Revised Civil Statutes of Texas, in connection with holding of the Primaries on July 27, 1940, and August 24, 1940, in Harris County, without cost to the candidates or the Democratic Party of any official thereof.

10. That Democratic candidates for the office of U. S. Senator and Congressman were nominated at the Primary held on July 27, 1940, and that such nominations were certified by the Secretary of State to the General Election officials as the Democratic nominees and that all of such Democratic candidates were elected to the office of U. S. Senator and Congressman at the November General Election of 1940.

11. That all qualified electors of the Negro race in Texas are similarly situated as the plaintiff in this law-suit, as to State-wide Democratic Primaries.

12. That the Defendants were Presiding Judge and Associate Judge of the Democratic Primaries in Precinct 48, Harris County, Texas, on July 27, 1940, and August 24, 1940, and they acted as such in refusing plaintiff the right to vote in said Primary.

13. After such Primary the names of the candidates receiving the nomination are certified by the County Executive Committee to the State Executive Committee, and the State Executive Committee, in turn, certifies such nominees to the Secretary of State who places the names of such candidates on the General Election Ballot to be voted on in the General Election. Such services are rendered by the Secretary of State, are paid by the State of Texas. Said Secretary of State also certifies other Party candidates as well as Independent candidates for places upon the General Election Ballot, such services as rendered by the Secretary of State are paid by the State of Texas.

14. Generally, the regularly elected Democratic Committeemen of each precinct in Harris County, Texas, are appointed to act as Presiding Judges in the Democratic Primaries. Generally the same individuals are appointed by the Commissioner's Court of Harris County, Texas, to act as Election Judges in the General Elections. The Defendants conducted the Primaries of 1940 in the same general manner as the General Elections, in which Negro Electors are permitted to vote.

THURGOOD MARSHALL,
H. S. DAVIS, JR.,
CARTER WESLEY and
W. J. DURHAM,

Attorneys for Plaintiff.

GLENN A. PERRY,
Attorneys for Defendants.

DEFENDANTS' STIPULATIONS.

Filed April 24, 1942.

(Title Omitted.)

For the purpose of the record herein, it is stipulated by and between the parties Plaintiff and Defendant hereto as follows:

1. That the Democratic Party of the State of Texas is a political party, and that it assembled in convention at Houston, Texas, on May 4, 1932, and unanimously adopted the following resolution:

"Be It Resolved that all white citizens of the State of Texas who are qualified to vote under the Constitution and laws of the State shall be eligible to membership in the Democratic Party and as such entitled to participate in its deliberations."

2. That the next above recited resolution has never been amended, abrogated, annulled or avoided by the Democratic Party of the State of Texas, in convention assembled since its adoption on the day named.

3. That the Democratic Primaries held in Harris County, Texas, on July 27, 1940, and August 24, 1940, were for nominations, and the candidates nominated by the Democratic Party thereat became candidates for election to the respective offices for which they sought the nomination at a General Election in Harris County, Texas, on November 5, 1940.

4. That the defendants did not deprive the Plaintiff, or anyone else similarly situated of the right to vote at the General Election in Harris County, Texas, held November 5, 1940.

5. The entire expense of holding and conducting the Primaries in Harris County, Texas, on July 27, 1940, and

August 24, 1940, were borne and paid for by the Harris County Democratic Executive Committee; that it received the funds therefor by levying an assessment against each person whose name was placed upon the Primary Ballot for the two Primaries named, and that the funds unused therefor, and which remained in the possession of the Harris County Democratic Executive Committee, were returned pro rata to each candidate for Democratic nominee who had made a contribution to the Harris County Democratic Executive Committee, following the assessment so levied.

6. That defendant S. E. Allwright was in 1938 elected by the Democrats of Precinct 48 as their party Chairman of such Precinct, and following party custom, was appointed as Presiding Judge to hold the two Primaries for the Democratic Party, hereinbefore mentioned, by the Chairman of the Harris County Democratic Executive Committee. Defendant James J. Liuzza was appointed Associate Judge. They received from such County Chairman instructions with respect to the holding of such Primaries.

7. That defendants received their pay for holding the two Primaries of the Democratic Party through the Harris County Democratic Executive Committee, or its Chairman, from a fund raised by the Executive Committee by an assessment of the candidates at such Primaries.

8. Defendants were paid for holding the General Election on November 5, 1940, by Harris County.

Respectfully submitted by:

GLENN A. PERRY,

Attorneys for Defendants.

W. J. DURHAM,
THURGOOD MARSHALL,
CARTER WESLEY and
H. S. DAVIS, JR.,

Attorneys for Plaintiff.

PL. EX. (1).

Instructions to Holders of Election.

1. Officers and Clerks should reach polls by 6:30 A. M.
2. Polls open at 7 A. M. and close at 7 P. M.
3. All officers and clerks shall take the following Oath:

"I solemnly swear that I will not in any manner request or seek to persuade or induce any voter to vote for or against any candidate or candidates, or for or against any proposition to be voted on; and that I will faithfully perform this day, my duty as an officer of this election and guard, as far as I am able, the purity of the ballot box. So Help Me God."

The oath will be administered by the presiding officer first administering it to all other officers or clerks at the same time; and immediately thereafter the assistant Judge will administer it to the Presiding Judge.

4. Examine supplies and see that officers are acquainted with duties.

5. Inspect the ballot boxes before using, to see that they are clear.

6. See that you have four tally sheets, four poll lists for names of voters, a list of qualified voters of your Precinct, and complete return sheets.

7. Have the presiding officer sign his name across back of ballots.

8. Designate the Judge to receive and number ballots and to deposit same in the ballot box.

9. See that each voter folds his ballot so that the name of the presiding officer can be seen before receiving it.

10. See that name of each voter is on certified list, and mark by his or her name a "V" for voted when vote is cast.

11. Begin counting as early as possible and attempt to keep your count up as closely as possible, in order that returns can be made of the Ballot Box to the Civil Court House with as little delay as possible.

12. At each change of the boxes, one of the Judges shall announce at the outer door of the voting place the number of votes already cast.

13. Do not allow any loafing or loitering within 100 feet of the polls.

14. Keep the ballot boxes within full view of the public.

15. See that ballots are marked with black pencil or ink.

16. At 2 P. M. count absentee votes which have been delivered to you.

17. Do not allow any voters to take into polling place any memorandum or prepared list to aid him in marking ballot.

18. In assisting an illiterate voter, have present two officers of election.

19. And do not tell him for whom to vote; you can tell him the names of the candidates and the office they seek, and let him make his own choice.

20. In case a voter mutilates a ballot, he must return it to officer, before receiving another, and he cannot be allowed to exceed three. You shall keep a list of mutilated ballots.

21. When ballot has once been deposited in the ballot box it cannot be returned to voter and by him corrected or changed.

22. In making returns, fill in blanks showing the total number of votes cast, and see that it tallies with the number of names on the Clerk's poll list.

23. Be careful to see that the number of votes each candidate receives is in plain figures opposite his name on the return sheet.

24. Carefully sign and seal the returns in duplicate at least. Deliver the returns promptly to the Court House on Fannin Street in Houston, Texas, bringing with you, properly prepared, the statement for clerk hire sent with these supplies.

HARRIS COUNTY DEMOCRATIC
EXECUTIVE COMMITTEE,
CHAS. E. KAMP,
Chairman;
GLENN A. PERRY,
Secretary.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW
PREPARED AND FILED BY THE TRIAL JUDGE
UNDER RULE 52 OF THE FEDERAL RULES OF
CIVIL PROCEDURE.**

55.

Filed May 11, 1942.

(Title Omitted.)

Thurgood Marshall, of New York City, N. Y.,
W. J. Durham, of Sherman, Texas,
Carter W. Wesley and H. S. Davis, Jr., of Houston, Texas,
For Plaintiff.

Glenn A. Perry, of Houston, Texas,
For Defendants.

Statement of the Case.

This is another of many cases arising in Texas, several in this District, involving the question of the right of negroes to vote in Texas Democratic Primary Elections.

Plaintiff sues Defendants, who are Democratic Primary Election Judges of Precinct 48, Harris County, Texas, for damages for refusing to allow him to vote at such Primaries on July 27, 1940, and August 24, 1940, and also prays, for himself and for other persons similarly situated, for Declaratory Judgment, declaring that they are entitled to vote at the Democratic Primaries in Texas.

The Jurisdiction is under Subdivisions 1, 11, and 14, of Section 41, Title 28, and Sections 31 and 43, Title 8, U. S. C. A.

Findings of Fact.

(a) Plaintiff is a negro, a natural born citizen of the United States, a qualified elector and voter under the Con-

stitution and other Laws of the United States and of the State of Texas, and on July 27, 1940, and August 24, 1940, resided in Voting Precinct 48, Harris County, Texas. He is a Democrat.

(b) On July 27, 1940, and again on August 24, 1940, being a qualified voter as stated, he presented himself before Defendants, Democratic Primary Election Judges of Precinct 48, exhibited his poll tax receipt, and requested that he be permitted to vote and cast his ballot at such Primary Election, which was being held for the nomination of State and County Officers, United States Senator, and Congressman. Defendants refused to allow him to vote, basing their refusal upon a Resolution of the Democratic Party in Texas passed May 4, 1932, to the effect that only white citizens of the State of Texas qualified to vote under the Constitution and Laws of Texas shall be eligible for membership in the Democratic Party and entitled to participate in its deliberations. All white citizens qualified to vote in such Precinct who presented themselves were allowed to vote at such Primary Election, but no negroes were allowed to vote.

(c) There is no proof as to the amount of damages, if any, suffered by Plaintiff by being refused the right to vote.

(d) The facts in detail have been stipulated, but it seems only necessary to refer to the Stipulations and make them a part hereof.

Conclusions of Law.

1. But for a subsequent decision of the Supreme Court (United States v. Classic, 313 U. S. 301, 85 L. Ed. 1368), this case could and would be quickly disposed of by citing Grovey v. Townsend, 295 U. S. 47, 79 L. Ed. 1292. Plain-

tiff, however, contends that because of the decision in the Classic case, *Grovey v. Townsend* is no longer controlling, and it is, therefore, necessary to examine closely the reasoning in both cases.

The facts in *Grovey v. Townsend* were substantially the same as here.

The Classic case was an Indictment against Classic, et al, Election Commissioners under the Law of the State of Louisiana, charging that they wilfully altered and falsely counted and certified ballots of voters cast in a Democratic Primary Election in Louisiana, to nominate a candidate of the Democratic Party for Representative in Congress. The question was whether the right of a voter to cast his vote and have it counted in such election was a right given or secured by the Constitution of the United States, so as to make Classic, et al, guilty of an offense against the Laws of the United States by wilfully altering and falsely counting and certifying the ballot of such voter. The two controlling points in the case, as stated in the Opinion, are as follows (*italics mine*):

"The right to participate in the choice of representatives for Congress includes, as we have said, the right to cast a ballot and to have it counted at the general election, whether for the successful candidate or not. Where the State law has made the primary *an integral part of the procedure of choice*, or where in fact the *primary effectively controls the choice*, the right of the elector to have his ballot counted at the primary is likewise included in the right protected by Article I, Sec. 2. And this right of participation is protected just as is the right to vote at the election, where the primary is *by law made an integral part of the election machinery*, whether the voter exercises his right in a party primary which invariably, sometimes or never determines the ultimate choice of the representa-

tive. Here, even apart from the circumstances that the Louisiana primary is made by law an integral part of the procedure of choice, the right to choose a representative is in fact controlled by the primary because, as is *alleged in the indictment, the choice of candidates at the Democratic primary determines the choice of the elected representative*. Moreover, we cannot close our eyes to the fact, already mentioned, that the practical influence of the choice of candidates at the primary may be so great as to affect profoundly the choice at the general election, even though there is no effective legal prohibition upon the rejection at the election of the choice made at the primary, and may thus operate to deprive the voter of his constitutional right of choice. This was noted and extensively commented upon by the concurring Justices in *Newberry v. United States*, 256 U. S. 263-269, 285, 287."

2. Discussing now the first controlling point.

In Louisiana, the State Law has made the Primary "an integral part of the procedure of choice". In Texas, it has not. In the *Classic* case, it is said with respect to the Louisiana State Law (*italics mine*):

"The primary is conducted by the State at public expense. Act No. 46, supra, Sec. 35. The primary, as is the general election, is subject to numerous statutory regulations as to the time, place and manner of conducting the election, including provisions to insure that the ballots cast at the primary are correctly counted, and the results of the count correctly recorded and certified to the Secretary of State, whose duty it is to place the names of the successful candidates of each party on the official ballot", etc.

In *Grovey v. Townsend*, it is said (*italics mine*):

"While it is true that Texas has by its laws elaborately provided for the expression of party preference as to nom-

inees, has required that preference to be expressed in a certain form of voting, and has attempted in minute detail to protect the suffrage of the members of the organization against fraud, it is equally true that the primary is a party primary; the expenses of it are not borne by the State, but by members of the party seeking nomination (Arts. 3108; 3116); the ballots are furnished not by the State, but by the agencies of the party (Arts. 3109; 3119); the votes are counted and the returns made by instrumentalities created by the party (Arts. 3123; 3124-5; 3127); and the State recognizes the State convention as the organ of the party for the declaration of principles and the formulation of policies (Arts. 3136; 3139)."

There are other essential differences between the Laws of the two States, all of which make it clear that, as stated, while the Law of Louisiana makes the Primary an integral part of the procedure of choice, the Law of Texas does not do so.

3. The other controlling point in the Classic case is the finding that "the choice of candidates at the Democratic primary determines the choice of the elected representative".

The main thing in this Record bearing on the question is this, quoted from the Stipulations:

"Since 1859 all Democratic nominees, for Congress, Senate and Governor, have been elected in Texas, with two exceptions."

If this is historically correct, which I doubt, and if I may look outside the Record, then such Stipulation fails to take into account that many times during the period named, there was strong opposition not only to the three Democratic nominees named but to other Democratic nom-

inees, and that the Democratic nominees for President failed to carry Texas in 1928. I do not regard the Stipulation quoted as meaning that the choice of candidates at the Democratic Primary in Texas "determines the choice of the elected representative". In politics "you cannot always sometimes tell which to least expect the most".

However that may be, I am not convinced that the Supreme Court would have based the ruling in the Classic case solely upon the second point, nor am I convinced that the Supreme Court intended to overrule *Grove v. Townsend*. I, therefore, follow *Grove v. Townsend*, and render Judgment for Defendants.

T. M. KENNERLY,
Judge.

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FINAL JUDGMENT.

' Filed May 30, 1942.

In the United States District Court for the Southern District of Texas, Houston Division.

Lonnie E. Smith

vs.

Civil Action No. 645.

S. E. Allwright, Election Judge, and James J. Liuzza, Associate Election Judge, 48th Precinct of Harris County, Texas.

On the 11th day of May, A. D. 1942, came on to be heard before the Court, and at a regular term thereof, the above entitled and numbered cause, wherein plaintiff, Lonnie E. Smith, sought to recover of and against the defendants, S. E. Allwright, Election Judge, and James J. Liuzza, Associate Election Judge, 48th Precinct of Harris County, Texas, \$5,000.00 damages, and for Declaratory Judgment

under Section 400, Title 28, U. S. C. A., declaring and adjudging (as stated in Plaintiff's First Amended Bill of Complaint):

"That the policy, custom or usage of the defendants, and each of them, in denying plaintiff and other qualified Negro electors the right to vote in Democratic Primary Elections in Texas, solely on account of their race or color, is unconstitutional as a violation of Sections 2 and 4, of Article 1, and Amendments Fourteen, Fifteen and Seventeen of the United States Constitution."

And the plaintiff and defendants appeared in person and by their counsel of record and answered ready for trial, whereupon the matters in controversy were submitted to the Court, and the Court having received and heard the bills, answers, stipulations, evidence and argument of counsel, is of the opinion that the law and the facts are with the defendants. It is, therefore,

Ordered, Adjudged and Decreed by the Court that plaintiff, Lonnie E. Smith, take nothing against defendants, S. E. Allwright, Election Judge, and James J. Liuzza, Associate Election Judge, 48th Precinct, Harris County, Texas, in his suit for damages. It is further

Ordered, Adjudged and Decreed by the Court under the Declaratory Judgment Act of the United States that the practice of the defendants in enforcing and maintaining the policy, custom and usage of which plaintiff and other Negro citizens similarly situated who are qualified electors are denied the right to cast ballots at the Democratic Primary Elections in Texas, solely on account of their race or color, is constitutional, and does not deny or abridge their right to vote within the meaning of the Fourteenth, Fifteenth or Seventeenth Amendment to the United States Constitution or Sections 2 and 4 of Article 1 of the United States Constitution. It is further

Ordered, Adjudged and Decreed by the Court that all costs herein in this Court expended be, and they are hereby taxed against the plaintiff, Lonnie E. Smith, for which let execution issue.

To all the above judgment of this Court the plaintiff, Lonnie E. Smith, excepted and gave notice of appeal to the United States Circuit Court of Appeals in and for the Fifth Circuit at New Orleans, Louisiana.

Entered this 30th day of May, A. D. 1942, as the judgment of the Court.

(S.) T. M. KENNERLY,
Judge.

Approved as to form and contents:

THURGOOD MARSHALL,
Attorney for Plaintiff.

GLENN A. PERRY,
Attorney for Defendants.

TRANSCRIPT OF TESTIMONY.

Filed June 6, 1942.

In the District Court of the United States for the Southern
District of Texas, Houston Division.

Lonnie E. Smith, Suing on Behalf of Himself and on Behalf
of Other Qualified Negro Voters in the State of Texas,
Plaintiff,

vs. Civil Action No. 645.

W. D. Miller, County Clerk of Harris County, Texas, and
S. E. Allwright, E. George and James J. Liuzza, As-
sociate Election Judges, 48th Precinct of Harris
County, Texas, Defendants.

Appearances:

Thurgood Marshall, Esq., and
W. J. Durham, Esq.,

Appearing for and on Behalf of the Plaintiff.

Glenn A. Perry, Esq.,

Appearing for and on Behalf of the Defendants.

The Court:

Civil Action 645, Lonnie Smith versus W. D. Miller. Is
the plaintiff ready?

Mr. Marshall:

Yes, if Your Honor please.

The Court:

Defendant ready?

Mr. Perry:

Yes, sir. If the Court please, I have amended answers
to the plaintiff's amended petition, which have been

signed by one of the two defendants, and the plaintiff waives further signature. If it please the Court, I would like to present them with one signature.

The Court:

Just file them.

Mr. Perry:

Thank you, sir.

The Court:

Do you want permission to amend, or have you already gotten it?

Mr. Perry:

We both announced at the time that this case was called that we would amend. I don't know whether the Court granted us permission at that time or not. We both have stipulations to sign and file, which I am checking over right this minute.

The Court:

All right. Gentlemen, you are going to trial on the amended pleadings filed today; is that correct?

Mr. Perry:

Amended pleadings filed today and amended answers.

Mr. Marshall:

If Your Honor please, there were some appendices to the original complaint, and in lieu of copying them again we can use those.

The Court:

In other words, your amended pleadings refer to your original pleadings for exhibits?

Mr. Marshall:

Yes, sir.

The Court:

All right.

Mr. Marshall:

And two sets of stipulations.

The Court:

Do you want to have the witnesses sworn, or do you have any witnesses?

Mr. Marshall:

We have one.

The Court:

Let us have them all sworn, both sides.

Mr. Perry:

Judge, the defendant was in my office when I left Judge McCalla's office, but whether he went back to this Court or that Court, I have not been able to ascertain; but he is in the vicinity right close around.

Mr. Marshall:

If Your Honor please, in order to further shorten the trial we have agreed that the depositions taken subject to the approval of the Court, of Mr. Butcher and Mr. Germany, can be used.

The Court:

Not in the previous trial of this case?

Mr. Marshall:

No, sir; of the Hasgett case.

The Court:

That is No. 449?

Mr. Marshall:

Yes, sir.

Mr. Perry:

I want to put Mr. Kamp's testimony also out of the Hasgett case.

The Court:

What are you agreeing to? Tell me again. Out of the Hasgett case?

Mr. Marshall:

The Hasgett case, the depositions of Mr. E. B. Germany and Mr. C. A. Butcher, and the testimony of Mr. Charles E. Kamp, who is now in the army.

The Court:

Then you have stipulations in this case?

Mr. Marshall:

Yes, sir.

The Court:

Two sets of stipulations?

Mr. Marshall:

Two sets, yes, sir; both signed by both sides.

The Court:

And in addition to that you have some oral testimony?

Mr. Marshall:

Yes, sir.

The Court:

Suppose you tell me what the case is about, I don't remember the Hasgett case.

Mr. Marshall:

Yes, sir. According to this case, during the primary election in 1940 the plaintiff is a qualified elector, there is no question as to his qualifications, and that he suffers no disqualifications, and that he applied to the County Clerk's office for an absentee ballot during the regular period preceding the primary election, and he was refused an absentee ballot on the ground of his race or color; and that at the election of July 27, 1940, he applied to his precinct, Precinct 48, and requested of the defendants a ballot and permission to vote in the Democratic primary, and he was refused this ballot on the ground of his race or color.

The complaint bases its jurisdiction on a violation of Article 1 of the U. S. Constitution, involving the election of congressmen, since congressmen were nominated and elected in 1940, and Article 14 of the Amendments to the U. S. Constitution, and Article 15 and Article 17, because a United States senator was likewise nominated and elected during this 1940 election.

The main difference between this case and all of the other primary cases is that in this case we not only alleged a violation of the Fourteenth and Fifteenth Amendments, but we also alleged a violation of Article 1, on the theory of the case of the United States versus Classic, the Louisiana primary case, if Your Honor remembers, decided by the Supreme Court last year.

The Court:

How do you get jurisdiction here; by reason of the claim that involves a question under the Constitution and value of more than \$3,000.00?

Mr. Marshall:

We claim both the question of jurisdiction on the \$3,000.00 point and the main point that we rely on is the

Civil Rights Statute, Sections 41 and 43, Title 8, which give a right of action for a violation of the United States Constitution and the United States laws.

The Court:
Section 41?

Mr. Marshall:
And 43 of Title 8.

The Court:
Of the Code?

Mr. Marshall:
Yes, sir, the Civil Rights Statutes.

The Court:
Also you stand under Section 41 of Title 28?

Mr. Marshall:
Yes, sir, and specifically Subsection 14 under Section 41, which does not require the jurisdiction of amount.

The Court:
In other words, you have three theories of jurisdiction?

Mr. Marshall:
Yes, sir.

The Court:
First under Section 41, the \$3,000.00 statute?

Mr. Marshall:
Yes, sir.

The Court:
And second, under Subdivision 14 of 41?

Mr. Marshall:

Yes, sir. And then there is one other, I think it is 11, which is specifically about voting. Subdivision 11.

The Court:

Of what?

Mr. Marshall:

Of 41. It specifically applies where there is a case involving the question of voting.

The Court:

You think you will get in somewhere?

Mr. Marshall:

That is what we are trying to do.

The Court:

What relief are you asking?

Mr. Marshall:

We are asking for damages in the sum of \$5,000.00.

The Court:

Damages in the sum of \$5,000.00? Is that the only relief?

Mr. Marshall:

And declaratory judgment, sir; declaratory under Section 400, Title 28.

The Court:

Does that about state your picture of the case?

Mr. Marshall:

That is the only difference between this and the others.

The Court:

What do you say in reply to these pleadings, counsel?

Mr. Perry:

If the Court please, our main contention is that this election is not an election that is in violation of the Articles of the Constitution, in that it is a Democratic nomination not an election.

The Court:

I see.

Mr. Perry:

Our defense is that these defendants in this suit are not State officials but are party officials of the Democratic party of Texas, and that the Democratic party of Harris County is a part of the Democratic party of Texas, and that the plaintiff in this case was denied the right to vote by the defendants, or of participating in the primary, because of a mandate of the Democratic party of Texas which was promulgated and handed down to the defendants on May 2, 1932, at a convention of the Democratic party of Texas held in Houston; that the denial or the failure of these defendants to permit these plaintiffs to vote or participate in these primaries constituted no violation of either the Fourteenth, Fifteenth or Seventeenth Amendments to the Constitution, or any of the other laws that have been cited by counsel for the plaintiff.

The Court:

In other words, you are standing about like the defendants stood in the Hasgett case?

Mr. Perry:

Practically the same, yes, sir.

The Court:

You may put on your proof.

Mr. Marshall:
Dr. Smith.

The Court:

I have not read your stipulation, but I take it you are not going to cover anything covered by your stipulation.

Mr. Marshall:

No, sir. There is just one point that was not covered by the stipulation.

Mr. Marshall:

All right, come around.

75 LONNIE E. SMITH was thereupon called as a witness on behalf of the plaintiff and, having been first duly sworn, testified as follows:

Direct Examination.

By Mr. Marshall:

Q. Dr. Smith, you are a qualified practicing dentist in the City of Houston?

A. Yes.

(By the Court):

Q. What are your initials?

A. L. E.

(By Mr. Marshall):

Q. And you are the plaintiff in this case?

A. Yes.

Q. Directing your attention to the time of the Democratic primary election in the year of 1940, did you attempt to secure an absentee ballot to vote in said primary election?

A. Yes.

Mr. Perry:

I would like to make objection at this time, please, to the absentee ballots in primary election, as these defendants are precinct committeemen of Precinct 48 and are not in charge of the absentee balloting or the balloting by absentee votes.

The Court:

Does he make the party who refused him the absentee ballot a party?

Mr. Marshall:

No, sir. What we are trying to do, sir, in our case, we allege that the refusal to give the plaintiff a ballot at the election was pursuant to the general policy, custom and usage in this area, and we want to show that, both in the absentee ballot and in the actual election, the reason, sir, that we cannot make the county clerk a party is because the county clerk is now dead. We just want to give the background of the case.

The Court:

I will take the objection with the case.

(By Mr. Marshall):

Q. Will you explain where you went in an effort to secure the absentee ballot?

A. I went over to the clerk's office, county clerk's office.

Q. Here in Houston, Texas?

A. Down at the Court House in Houston.

Q. In Houston?

A. Yes.

Mr. Perry:

My objection, of course, will go to the entire line of testimony?

The Court:

Yes, sir; that will be all right.

Mr. Perry:

Thank you, sir.

(By Mr. Marshall):

Q. In Harris County?

A. Yes.

Q. And what office did you go to?

A. To the county clerk's office.

Q. And what did you request when you went there?

A. Well, I requested an absentee ballot.

Q. For the primary election?

A. For the primary.

Q. And what happened then?

A. Well, he told me that—

Q. Who told you?

A. The fellow that was giving out the absentee ballots.

Q. Where was this person that you are speaking of?

A. It was in the Court House over there in the clerk's office.

Q. Do you know his name?

A. No, I don't know his name.

Q. Did you present your poll tax receipt?

A. No, he didn't ask for that.

Q. Well, at that time, was this individual giving out other absentee ballots to other people?

A. Yes.

Q. Were those people white people?

A. They were white.

Q. And did he refuse to give you an absentee ballot?

A. Yes.

Q. Did he say why?

A. He said it was a Democratic primary and negroes was not allowed to vote in it.

Q. And he refused to give you an absentee ballot?

A. Yes.

Q. And after that time did you notice that he gave out any more ballots to white people in the office?

A. When we turned around and left and was going out, there was some more behind, white people, and he gave them ballots right on.

Q. Did you hear what was said between this individual and any of the white people who were applying for ballots? Did you hear what they said?

A. They asked for a ballot and he just gave it to them.

Q. Did you hear him ask them what party they belonged to?

A. No.

Q. Did you have your poll tax receipt with you?

A. Yes.

Cross Examination.

By Mr. Perry:

Q. You don't know the gentleman's name that you talked to over there, do you?

A. No.

Q. Did you hear the entire conversation between the clerks and the people who were applying for absentee ballots?

A. They asked for a ballot and he just gave them a ballot.

Q. Were you present during all the conversation?

A. You see, when I go in the office they just asked for a ballot and walked right out behind. I was right behind them.

Q. Do you know what was said to them as they went into the other office or wherever they went?

A. Nothing said.

Q. Nothing said. Was there anybody else in there?

A. There was different clerks.

Q. Did you hear all of the clerks talking to each individual as he went in?

A. I don't understand you.

Q. Did you hear all the conversation between each and every clerk with each and every absentee voter?

A. There wasn't but one clerk that was giving them out, and he was not asking them any questions.

Q. He was not asking any questions. You don't know what his name was?

A. No.

Q. That was in the Court House here?

A. That was in the Court House.

Mr. Perry:

That is all.

(By the Court):

Q. When was that now?

A. That was in July, 1940.

Q. Just before the Democratic primary?

A. Yes, sir.

Q. Were there any other colored men around?

A. There was four of us.

Q. Four of you? Did they go in ahead of you or behind you?

A. We was all along together. I was in the head.

Q. He told you that it was a Democratic primary and he would not give you an absentee ballot?

A. Yes. He said he was not giving it out to colored and if I wanted to know any more about it, to go to some headquarters in some bank building or something.

The Court:

Any other questions?

Mr. Perry:

No, sir.

Mr. Marshall:

No further questions.

The Court:

Stand aside. Call your next witness.

Mr. Perry:

If the Court please, may I have about three minutes to call my office and check up on the defendants, sir?

The Court:

Yes.

(Short recess.)

The Court:

Where will I find these depositions in the Hasgett case?

Mr. Marshall:

We have them here, sir, in the printed record, and they are also in the files here in the Court.

Mr. Perry:

They are in the Clerk of the Court's record, together with also the printed record that went up on appeal.

Mr. Marshall:

We are going to leave these with the stenographer.

The Court:

All right. I can get a copy of it, I guess.

Mr. Marshall:

Yes, sir. They are filed in the Hasgett case.

The Court:

Yes; that is handy to use.

Mr. Perry:

There is one available to the Court, I am sure. If it is not in the files, I have it in my office.

The Court:

Was it filed in the Circuit Court of Appeals?

Mr. Perry:

Yes, sir.

The Court:

What became of the proceedings up there?

Mr. Marshall:

We dismissed them, sir, because in the meantime this Classic case had come up and we wanted to get it under that.

Mr. Durham:

We have one to furnish the Court.

Mr. Perry:

I believe attorneys for the plaintiff intend to file briefs with this Court in connection with this case. Have you filed yours?

Mr. Durham:

No, sir, we have it prepared, but have not filed it.

Mr. Perry:

I will be another two days preparing this.

The Court:

Is this all the evidence?

Mr. Perry:

We have one more witness, I believe. Yes, sir. He is on the way over now.

The Court:

All right. I notice that I based my decision before not on what I thought about the cause, but what the Supreme Court thought about it.

Mr. Perry:

That is correct, in Grove versus Townsend. That case is still the case on this point so far as we understand the law.

The Court:

You think there is something later?

Mr. Marshall:

We think the Classic case settles it now.

82 S. E. ALLWRIGHT was thereupon called as a witness on behalf of the plaintiff, and, having been first duly sworn, testified as follows:

Direct Examination.

By Mr. Marshall:

Mr. Marshall:

If Your Honor please, we want to question him as an adverse witness just a moment.

The Court:

All right. What is the name?

A. Allwright.

(By Mr. Marshall):

Q. All what?

A. A-l-l-w-r-i-g-h-t.

The Court:

What are your initials, Mr. Allwright?

A. S. E.

The Court:

Is he the defendant?

Mr. Marshall:

Yes, sir.

(By Mr. Marshall):

Q. You are the defendant in this case?

A. How is that?

Q. You are one of the defendants in this case, and you are the judge of the election in the 48th Precinct?

A. Yes, sir.

Q. And you were such judge during the Democratic primary election in the year of 1940?

A. Well, I have been chairman out there for the last 12 years.

Q. And as chairman you have acted as an election judge of the primary at each one of the primaries during that period? Your answer is yes?

The Court:

Answer out, please.

A. Yes.

(By Mr. Marshall):

Q. Prior to the primary election in 1940 did you receive printed instructions as to the method of holding the election?

A. Yes, sir.

Q. Do you remember those instructions, what they were?

A. Well, no, I don't remember them right offhand, no.

Q. I show you a sheet of paper entitled "Instructions to holders of elections" and ask you if that is the type of sheet you received?

A. I imagine it is, yes.

Q. So far as you know, this is the same type?

A. Yes. I never read it all, see, but I am sure that it is the same type.

Mr. Marshall:

Do you have any objection to its admission?

Mr. Perry:

No.

Mr. Marshall:

If Your Honor please, we tender this as Plaintiff's Exhibit 1.

(The document was received in evidence as Plaintiff's Exhibit 1.)

The Court:

Let me see it.

(The document was handed to the Court.)

The Court:

I don't see anything in here about negroes voting.

Mr. Marshall:

No; that comes separately, I think.

The Court:

All right.

(By Mr. Marshall):

Q. Mr. Allwright, do you, in the conducting of the primary election and the general election, take the same oath for both elections?

A. Well, I am not sure about that.

Q. Did you take the oath on this sheet here?

A. Yes, I taken it on that.

Q. And at the general election, do you take the oath from—

A. The instructions that they send out.

Q. So far as you know, they are the same oaths, in the language of them?

A. Well, I don't know about that, I would have to read them both to find out. I don't pay that particular attention, whether it is the same oath. I would have to have them both to read them to be sure about that.

Q. Mr. Allwright, when a white person comes into the polling place during the primary election of 1940 and asks for a ballot to vote do you ever ask them what party they belong to?

A. No, we never ask them.

Q. As a matter of fact, if a white elector comes into the polling place to vote in the Democratic primary election, he is given a ballot to vote; is that correct?

A. Right.

Q. And negroes are not permitted to vote in the primary election?

A. They don't vote in the primary.

Q. But any white person is that is qualified; regardless of what party they belong to, they can vote?

A. That is right.

Q. And you do let them vote?

A. Yes.

Mr. Marshall:

Your witness.

Cross Examination.

By Mr. Perry:

Q. Mr. Allwright, do you receive any other instructions at the time of the primaries other than the printed instructions that you identified here?

A. No, I don't think we do. I am not certain about that now, but I know that we get this instructions.

Q. And you comply—

A. And that is what we go by, the instructions that we receive.

Q. You go by the instructions that you receive?

A. Yes.

Q. If you receive this instruction, that is the instruction you followed; is that correct?

A. Yes.

Q. Mr. Allwright, who appoints you as presiding judge?

A. Well, the executive committee, don't they?

Q. You mean the Harris County Democratic executive committee?

A. The Harris County Democratic party appoints me.

Q. Who tells you how many clerks you can have?

A. They do.

Q. Who tells you how much money you receive?

A. They do.

Q. Do you abide by those instructions?

A. Yes, sir.

Q. In holding primary elections, Mr. Allwright, I will ask you if the instructions that you receive from the Harris County Democratic executive committee are the instructions by which you abide in the handling of elections?

A. Yes, sir.

Q. Was that true in 1940?

A. Yes, sir.

Mr. Perry:

I believe that is all.

Re-Direct Examination.

By Mr. Marshall:

Q. Mr. Allwright, you did refuse the defendant in this case a ballot at the primary in 1940?

A. You say did I do it?

Q. Yes, sir.

A. Not as I know of. It might have been one of the clerks that done it. I don't know as I done it. I wouldn't say that I did.

(By the Court):

Q. There were not any negroes voted in the primary in 1940 here in Houston, were there?

A. I beg your pardon?

Q. There were no negroes voted in your precinct in the primary in 1940, were there?

A. No, they don't never vote in the primary.

Re-Cross Examination.

By Mr. Perry:

Q. One further question: Did you handle the general elections on November 5, 1940?

A. I have handled them all.

Q. At that time did qualified negro electors vote?

A. In the presidential election?

Q. Yes, general election in November.

A. Yes, sir; they all vote then.

Q. They all vote?

A. Yes.

Q. You didn't restrict this plaintiff or any other negro the right to vote in that election?

A. They all have a right to vote. They all vote.

Mr. Perry:

I believe that is all.

The Court:

Do the records show that this primary in 1940 was for the purpose of nominating congressmen and senators?

Mr. Perry:

Yes, sir.

Mr. Marshall:

Yes, sir, the stipulation.

Mr. Perry:

The stipulation covers United States senator, congressman, governor and other State and local officers, yes, sir.

The Court:

Any other questions?

Mr. Marshall:

No, sir.

The Court:

You may stand aside, please.

Mr. Marshall:

That is all.

The Court:

Do you gentlemen wish to argue it?

Mr. Marshall:

We both rest.

If Your Honor please, we have a pretty exhaustive brief here, and if Your Honor wants to hear us besides the brief, we are perfectly willing to argue it.

The Court:

If you care to present it on briefs, I will be glad to have them. That is a perfectly satisfactory way to present it.

Mr. Marshall:

Your Honor, the case shapes up—just a brief point—it shapes up entirely under the two points, we think: No. 1 is that we have always taken the position that Grovey versus Townsend was in dispute or opposed to the other decisions on primary elections, and the Classic case settles that.

The Court:

You believe that is not sound?

Mr. Marshall:

I hate to go that far, sir, but that is the way we have been driven to, and I think the Classic case points that out very well, because in the Classic case it involved the usual political procedure in Louisiana of changing ballots and throwing out ballots and corrupt political practices in some areas. In this Classic case some white voters in the Democratic primary had their ballots tampered with, and an action was brought under Sections 51 and 52, Title 18, which are the criminal provisions of the same Civil Rights Statute that we are under here, and the Classic case held that the Democratic primary in Louisiana was an integral part of the election machinery, and the refusal to permit this man's vote to be counted was a violation of Sections 51 and 52, and it went further in 52 to hold that it was done under color of State statute, which to our mind throws the Grovey versus Townsend case out. The decision mentioned Nixon versus Condon and Nixon versus Herndon, and does not mention Grovey versus Townsend at all, just ignores it, and goes around, cuts all the ground work out from under it and lets it stay.

The Court:

Is there another decision of the Supreme Court about the same time as the Louisiana case?

Mr. Marshall:

Not on the primary. At least I did not find one.

The Court:

I thought there was.

Mr. Marshall:

No, sir. In the case in Louisiana, according to the opinion, it is based on the statutes, Your Honor, as to whether or not it is State action. We have furnished in our brief as Appendix B a chart or table showing the statutes in Louisiana used in the Classic case and the statutes in Texas used in the Classic case. They are almost identical, with one exception. In Louisiana the candidates are assessed money; they pay their money into the county and State treasury, and then the county and State pay for the primary. That is the difference between Classic and Texas.

The Court:

Do they pay anything more than that to the county and State?

Mr. Marshall:

It is not clear, sir. The difference, so far as we are concerned, is immaterial, because in Texas the candidates pay for the election, with the exception of what is performed by the State, which nobody pays for except the taxpayers. So that the statement that the expenses of the primary are paid by the Democratic party in Texas is not true. The county clerk does certain things, the secretary of State will do certain things, and the other officials do certain acts, and they are not paid for it, and they are incidental to the primary election. But the persons

who pay the actual expenses of the running of the primary; the buying of paper and pencils and stuff like that, and the payment of the clerks' and the judges' salaries for the election, are not paid by the Democratic party; they are paid for by the candidates. In Louisiana they are paid for by the candidates. So there is actually no difference in who puts up the money for the primary between the laws of Louisiana and the laws of Texas. And it is quite clear that the money that is paid in Texas, according to the Supreme Court of Texas, does not belong to the Democratic party; it never belongs to the Democratic party; it is a trust fund, and after the election the balance must be returned to the candidates. That is the Supreme Court of Texas, as cited in the brief. So that actually the party does not pay for the elections; the candidates pay for it, the same way as they do over there in Louisiana. But this case is stronger than the Louisiana case, on several points. In Louisiana it was doubtful as to whether a Democratic candidate could run in the general election, and the Supreme Court said that, although it was doubtful the way they construed the statutes, he could not run. But I point out to you, sir, as we do in the brief, that in Texas a candidate who is defeated is out. So that, as a matter of fact, the only way that our plaintiff and the other negroes can have anything to do with this election is at the primary. The final election is just a form matter. The Democratic nominees have always won, with two minor exceptions back in 1860, when that other party, the No-Nothing party won. And then we all remember about Governor Smith. There are only two exceptions. They are always elected, and the Supreme Court, although the people who argued Grovey versus Townsend, insisted that that was a point that had to be considered, and in Grovey versus Townsend the Court said it did not have to be considered, in the Classic case they said that is the important point to be considered, which I say is another reason for saying Grovey versus Townsend is out.

The other point is that, as we argued in the Hasgett case—we did not have anybody to agree with us outside of Your Honor; the Supreme Court said we were wrong, of course—where you divided it up into two sets instead of one you are still smack up against the Fourteenth and Fifteenth Amendments. The Classic case says that. The election so far as we are concerned and so far as the Classic case is concerned consists of one step, which actually is the primary, because the other part is nothing but a mere formality.

So that, if the Constitution means anything at all, then it takes form and throws it out the window and looks for substance.

The other difference, if Your Honor please, is that in every case, Nixon versus Condon and the Herndon case and Grovey versus Townsend—I have checked the briefs in the Supreme Court Library in every one of those cases, and in every case they have argued the Fourteenth and Fifteenth Amendments, and for some reason the Supreme Court would never go the Fifteenth Amendment; they always sent it off on the Fourteenth Amendment.

The Court:

Didn't they discuss it in the Grovey case?

Mr. Marshall:

They discussed it by saying it did not apply. After arguing it all the way down, they just threw it out. I mean they didn't go into it. But I point out to you, sir, that the Fifteenth Amendment does not say anything about elections. It talks about the right to vote, and it does not say the right to vote where or the right to vote in what. It says the right to vote. Well, there is no question that this Democratic primary consists of votes. There is no question that he went there to vote. So it has always been our position that the Fifteenth Amendment applies to all of those actions involving voting.

And that is the other point that we rely upon as much as we possibly can, is that we are not only standing on the Fourteenth Amendment here, we are standing on the Fifteenth Amendment. And we want to go back to the Herndon case. The point that the Supreme Court has completely ignored is the statement of Mr. Justice Holmes in that case to the effect that the right to vote in the primary was just as valuable as the right to vote in the general election. The Supreme Court decided that in the Herndon case. Mr. Justice Holmes wrote it and the Supreme Court adopted it, and then in the Nixon versus Condon case they weaved away from it, and in Grovey versus Townsend they completely ignored it. We want to go back to that point now, and we think in the Classic case it allows us to go back.

If Your Honor please, when Grovey versus Townsend was up there, there was United States versus Newberry and four or five other cases, all of which were contrary as to whether or not a primary was anything or nothing. It was not clear at all. So when Grovey came up the Supreme Court did not know where to go on the question of primary, because it had never been decided.

Now United States versus Classic comes out, takes the United States versus Newberry case and the other cases, distinguishes them, moves them aside, and sets up in very clear form the one proposition that where the primary election is the integral part of the election machinery of a State, then it is subject to Federal control. That is the yardstick they set down. They use the other points, every one of which we come under.

Now that that case is decided, then we submit that the Grovey case does not apply, unless there is somebody can distinguish the statutes in Louisiana from the statutes in Texas, and they are practically identical, with the exception that the Texas statutes are stronger on certain points as to making the election actually a part of the election machinery.

There is no question about it here. In so far as I read the record in the Classic case, it is a Democratic primary. I mean it is for Democrats. Like up in the other States where we have primaries, in Maryland, for example, you register as a Democrat or a Republican, and if you register as a Democrat you cannot vote in the Republican primary. They don't ask you what you are when you go in there. They look on the books, and you vote in the primary that you have registered for. But I submit that this Democratic primary is not a Democratic primary. It is open to anybody, the same as the November election is, except that it is not open to negroes. It is not a Democratic primary; it is a primary. Republicans can vote in it, Socialists can vote in it, Communists can vote in it. Anybody can vote in it that desires to but a negro. It is therefore actually not a Democratic primary; it is a primary. I submit that that is stronger than the Classic case or any other case that I know of.

There is no difference—and it is stipulated there—there is no difference in the running of the two elections, as to the actual performing of the duties by the election judges, between the primary and the general election, except that negroes can vote in the general election but they cannot vote in the primary. That is the only difference between the two elections. So it cannot be a Democratic primary. It is just a primary.

I submit, if Your Honor please, that the only conclusion we would have to conclude on is that the case of White versus the County Committee, that Your Honor decided, decided before Grovey versus Townsend, set down the law. Grovey versus Townsend would have followed it, but after a few years the Supreme Court caught up with the—and I submit that the decision here in the Classic case is perfect justification for Your Honor ruling the same way that you ruled in the Hasgett case on down to the point where you say "I have not changed my views", and the Supreme Court now gives full authorization for it, and that is why

we went back and came up under the Classic case. That is the only difference.

Mr. Perry:

If the Court please, we will, of course, differ with counsel for plaintiff, in that the Classic case grew out of the criminal end of the statutes, based upon votes that had been cast one way and other destroyed or changed another way. In this case no vote has been cast. He also makes the statement that, if a candidate in the Democratic primaries is defeated, he is out. As far as being a Democratic candidate, he is out, but there is no law to prevent the Secretary of State or the officers who certify his candidacy as an independent candidate on that ticket from doing so. He can still run if his party or if his backing so chooses to run him.

On the general election ticket there happens to be the Democratic, Republican, Independent, and other parties listed.

The Grovey versus Townsend case is practically the same case as this case, except that in that instance the suit was filed against Albert Townsend, who was a State-paid county clerk who refused Grovey the right to vote, and the Supreme Court held even then, in his official capacity as county clerk, by the resolution that has been stipulated to and in evidence, the Democratic party had that right.

Our contention, and our pleadings will support the contention, we hope, that the State laws of the legislature of the State of Texas, regardless of the laws they pass, are not binding upon the Democrats. They have no force and effect upon the Democratic party; that the party rules and the control of the party and the controlling of the primaries which are nominations to election are controlled by the Democratic party in convention, and that the rules of that body have not been changed with reference to the right of who shall participate.

We have never contended that these officers do not do their duty. They have followed the statutes if they so desired. We have no control whatsoever over the county clerk, the County Judge, the Secretary of State, or any of those officers in their State offices. There is no question about that. But their acts in accepting absentee ballots for the Democratic party or for the Houston city elections or for the Houston Independent School District or for any other drainage district that wants to hold an election, the county clerk's office accepts all of those ballots. As a matter of fact, I don't believe he has to if he does not want to.

So, as far as the statutes and laws are concerned, no matter what the statutes of Louisiana might happen to be or what the statutes of Texas might happen to be, the contention of the defendants in this case is that the statutes do not apply to any acts of the Democratic party of Texas. We will, of course, elaborate more fully on that in our brief which we will file today.

We think that this case is entirely within the meaning of the Grove case, and the Classic case can be distinguished.

The Court:

You will have your briefs in, you say, in a few days?

Mr. Perry:

Yes, sir.

The Court:

Do you want time in which to reply?

Mr. Marshall:

If Your Honor please, it depends on the brief. The only question is it will take two days to reach me, but a week outside will be time enough.

The Court:

I will say, briefs in ten days, and you can get yours in in two days.

Mr. Perry:

Yes, sir.

The Court:

And you can get yours in then?

Mr. Marshall:

Yes, sir.

The Court:

Mark the case submitted; briefs in ten days. The clerk will take charge of all these exhibits and this printed record and the brief of counsel.

(At 11:40 o'clock A. M., the hearing was closed.)

100 E. B. GERMANY was thereupon called as a witness on behalf of the plaintiff and, being first duly sworn, testified by deposition as follows:

Direct Examination.

By Mr. Durham:

Q. You at present Chairman of the Democratic committee?

A. Executive committee.

Q. And how long?

A. Since the Beaumont convention, I think that was 1938.

Q. And have you held any other offices in the party before that?

A. No.

Q. How long have you been active in the Democratic party?

A. Since I was able to vote, since I was twenty-one.

Q. Is the party itself incorporated—I mean can you explain just the set-up of the party itself?

A. It is a voluntary association. The Democratic party is just an association of Texas people into an organization and it functions to select its candidates and try to get its policies adopted by the State.

Q. Now, I mean—how do you become a member of the party itself?

A. Just go and vote.

Q. Just by voting for a Democratic candidate?

A. There is no way—as far as I know there is no way to join the party itself; membership is defined by or has been defined by State conventions; I don't remember how long back it has been, but the membership of the party, the best I can tell has been defined.

(At this point examination was recessed temporarily.)

A. Let me answer that over again. I don't know just what I said. I want to get that straight. Let him ask that question over again.

Q. How does an individual go about becoming a member of the Democratic party?

A. Well, I don't know, to be honest with you. So far as I know if they go into the primary and vote—well, there have been rules prescribed for people who are members of the party, but so far as a method of becoming a member of the party, I don't know, if qualified to be members I think they only have to go and vote and attend the conventions.

Q. Do you know any qualifications, as such—first of all, are there any written qualifications any place?

A. Not in my records; I have not seen any.

Q. Is there any general understanding about it?

A. I don't know.

Q. So far as you know?

A. You see, the State Chairman of the Executive Committee, nor the Executive Committee do not function at primary elections, they simply canvass the returns of the elections; the election is held by the County Democratic Executive Committee and under the supervision of the Democratic Committee Chairman. Our function is simply—my Executive Committee acts—serves as an auditing committee to canvass the returns of these people and we do not pass on qualifications to vote, and it never has come around—become my province to check into it.

Q. Of your own personal knowledge do you know of anything, outside of race or color, that would prevent a citizen of Texas, whose name appears on the poll tax lists from becoming a member of the Democratic Party?

A. I don't know that race or color would. I can't even answer that question. I don't know what the qualifications are. I know what you are driving at, of course. I don't have any knowledge of it; I have never attended a convention where that question was passed on, it has never been passed on by the Executive Committee, of which I am a member. I don't know anything about it. From hearsay I could give you a lot of testimony, but I know you don't want that.

Q. Now, since you have been chairman has your committee taken any action to prevent negroes from voting in the primary?

A. No.

Q. Has the convention done so?

A. Not while I was chairman.

Q. Has the question come up at all?

A. Not at all. I want to be careful to tell the truth. I have had inquiries from people in this regard. I have always referred them back to our county chairman when I had any, I just referred them to the county chairman, told him it did not come in our province to pass on that question.

Q. Now, you are familiar with the laws in regard to the action of your committee on the election itself, the primary elections, about canvassing the votes, and so forth?

A. Yes.

Q. Does your committee follow those statutes—I mean as to time and place of the canvassing?

A. As near as we can we do; it is just a matter of uniformity, we follow the general statute that applies to all political parties, there is no statute for the Democratic party no more than the Republican or anything else.

Q. You follow the statutes on places of over 100,000 votes?

A. Yes.

Q. You follow those as nearly as you can?

A. As near as we can; it is impossible to follow the letter all over the State; we cannot on all of them.

Q. In the days when primary elections are to be held, you fix those dates; do you follow the dates set out in the statute?

A. Oh, yes. Yes.

Q. How is that done by your committee?

A. My committee meets and fixes the time for the conventions, that is, the place of the convention, the time is already set; we agree to those times, if it is agreeable, convenient. It is usually convenient.

Q. The date is the fourth Saturday in July?

A. We follow the statute, whatever the statute says on that governing all political parties.

Q. Then after that the particular primary elections are held by the individual county executive committee?

A. Yes.

Q. After that the votes are cast, then they are canvassed by your committee?

A. Yes, the returns are forwarded to the chairman of the State committee (me, in this instance) and a copy is forwarded to the secretary of the committee, and we have an auditing committee that checks those returns.

Q. The proceedings each year, where elections are to be held, primary elections, all your committee does is follow the statutes, there is no variation except minor variations in the following of the statutes, is that correct?

A. I would not say there is any variations, sometimes we have some slight variations that don't amount to anything particularly, but we, as nearly as we can, follow the law as we understand it. We understand there is a general law covering all political parties, we follow that general law in so far as certifying our candidates for the general election, both in primary and in convention. All political parties have to meet the same date, all their conventions the same way. We follow that statute as nearly as we can.

Q. Now, are you familiar at all of your own knowledge, I mean of the—I don't know what word to use—several efforts of negroes to try to vote in the primary over a period of twenty years?

A. No, I am not. I don't think anything like that came up in the county where I lived. I know by correspondence—I have had questions put to me—I always referred them to the county chairman and Attorney General.

Q. Isn't it true in your county one time negroes voted in the primary?

A. I don't know. I was raised in Van Zandt County. I have only been in Dallas twelve years. I think they vote in city elections right now, don't they?

Q. Do they, Roger?

Roger Mason:

Yes.

A. I am not a citizen of Dallas, but I understand they do vote in city elections.

Q. During your time as chairman of the committee have you or any member of your committee under your instructions instructed the several county committees to prevent negroes from voting in the primary?

A. Never have.

Q. You did not direct your attention to the elections held last year, 1940—were any instructions issued they were to bar negroes from the primary?

A. Never did.

Q. Were any instructions issued by the convention itself?

A. At Beaumont?

Q. While you have been chairman?

A. I think not. There were not any at Mineral Wells; I was chairman during the Mineral Wells convention. There were no instructions then.

Q. Can you give us an idea what year it was in Mineral Wells?

A. It was in 1940, it was in September, 1940, I believe.

Q. The convention just prior to that, are you familiar with that?

A. The convention—there were several conventions, you understand. The Waco convention was a few months prior to that when we selected our candidates for the National Convention, that is what we call our National State Convention. We have two State conventions on presidential years, one State convention selects delegates to the National Democratic Convention, this is our province, that convention was held in Waco in 1940, and the question was not in issue there. Then the Mineral Wells convention was held, I think, in September following the National Convention in July, I believe our National Convention was then. So far as I know the question was not brought up at any time since I have been in the county; it may have been, in committee, if it did, I did not hear of it.

Q. Prior to then—

A. (Continuing.) We had our State gubernatorial convention at Beaumont at which I was made State chairman. I was a delegate from Dallas County at that convention if that question was brought up I never did know anything about it. I am sure it was not voted on.

Q. Then from the time, from 1938 up until the present time neither the convention itself nor your committee has issued any orders to the local committees; county committees, to bar negroes from voting?

A. I can't say; the convention did not to my knowledge, it did not. I have no records except the records of the executive committee, it has issued no such orders.

Q. The minutes, what about them?

A. I have not seen the minutes. I have asked Mr. Kennedy for them several times, but I have not gotten them.

Q. You are sure the committee has not?

A. No, the committee has not.

Q. This other point is that of the question of the appointment of the election judges and machinery for running the primary and all, is that left up to the county?

A. The county chairman, the county convention is a political unit itself, and the county convention elects its own officers, the county chairman and the various precinct chairmen and all are elected there, and they function as the election organization. Does that answer your question?

Q. The question of the relationship of the executive committee to the convention itself, I mean what is the relationship?

A. Well, the convention sometimes away back in the past fixed some kind of a policy, I imagine, so far as I know it is just tradition handed down to the executive committee, the duties of making the arrangements for the convention, auditing the returns, and so forth, and making a report to the convention for its confirmation, it is just that; subsequently as I understand, the State executive committee has no authority to make any policies or determine any program for the convention but they set up the machinery, preliminary machinery by which the convention goes to work each time. If you want a little more detail, the executive committee arranges the place for the meeting, the State committee sets up a program for the temporary officers, which are usually confirmed from then

on the temporary officers put the convention in operation, then the convention is out of the hands of the State executive committee.

Q. Then after the convention is over the actual management of the party reverts back to the committee, doesn't it, between conventions?

A. Well, in so far as carrying out the program and policy of the convention, I would say yes. They can't fix any policies; they carry out the policies adopted by the convention.

Q. There are no permanent offices of the Democratic party with the exception of those committee members?

A. No, and they serve from one convention to the next, one gubernatorial convention to the next.

Q. Is there any carrying over policy or program from convention to convention? What does each convention adopt, its own policy platform and rules, and so forth?

A. Now I don't know whether I know how to answer that question or not because I have never been at one convention that held over; I have only been to two conventions as an official or as a member. I have never been a delegate except to two State gubernatorial conventions, the Presidential Convention came in between. So far as I know unless there is a resolution passed which changes the general situation, as a matter of precedent only, the conventions assume that whatever has been done in the past goes on and on until it is changed. Now if there is just a matter of precedent, I don't know whether there is a rule or regulation that would fix that policy—I am not trying to dodge the issue—that is the best I can come to it.

Q. Who has the records of the convention?

A. The State secretary has them.

Q. The secretary has them?

A. Mr. Butcher keeps the records of the State executive committee and as far as I know—I don't know who keeps the records of the convention unless he does; I guess he is ex-officio secretary of the convention, at least he

was the last one. At Waco Mr. Van Kennedy was the secretary of the convention, that is the National State Convention when they elected State delegates. Mr. Van Kennedy was secretary of that convention. It does not necessarily follow that the State secretary of the executive committee is secretary of the convention. Many times he is not. That is the case there.

Q. Mr. Germany, I believe you stated that the policy of the Democratic party was adopted at a convention by its members at a gubernatorial convention?

A. Yes.

Q. Unless there was some rule or regulations, some resolution adopted at a prior convention that set a new precedent, the policy is continued?

A. Just as a matter of precedent, I think that is the case. I don't think there has been any regulation so far as I know, I don't have any records to go by, I have no way to speak from the records, just from my observation of the way things are carried on, that is pretty generally carried, the truth of it is it is a loose jointed organization. If anybody can tell what to do they are beyond me, I don't know.

Q. Here is what I was getting at: When you became chairman did the Democratic party in convention continue the policies that had been in effect or adopt a new policy in reference to the policy of the Democratic convention?

A. I don't know. That was my first convention. I don't know what they did was new or old or what. Just from my impression of things I presume they went along in the usual slipshod way of handling things. That is not very complimentary of the Democratic party; that is the way it takes place, whoever wants to get up to make a resolution if he can say anything before anybody else it usually gets by. It is pretty hard to say there is any fixed policy, it is a policy that the convention does whatever the people there want to do at that time. There is no rule

to keep them from doing it some other way if they want to. That is the best I can say. That is the way it has been when I was there; what they expected to happen usually did not happen.

Q. But the orderly procedure of the primary election is regulated by statute, it is followed section by section, that keeps it in a general channel, doesn't it?

A. Well, I will tell you, as a Democrat I don't think the legislature has got a darn thing to do with the Democratic party. As a matter of convenience we follow the statute in reference to these things. I don't think the legislature could have anything to do with it. If we did not do it, there is not a thing they could do about it; just like I am a Methodist, if the Methodists decide to hold our quarterly conference in Fort Worth and it is not in our district, it is not anybody's business if we decide to hold it there. I feel the same thing about the Democratic party. It is an organization that has to follow the statute except in reference to fraud, if we violate the fraud statute and there is corruption I think they could be prosecuted like my boys could perpetrate a fraud on me in the business, otherwise I don't think the legislature has anything to do with it.

Q. You do follow it?

A. As a matter of convenience it is followed. I think we would have considerable argument if we tried to change it to some other date because it is a matter of convenience. If people have a definite time fixed for a certain thing to happen it is a lot easier to celebrate the Fourth of July on the Fourth; in fact, Thanksgiving comes all right on the new date, then it is a matter of convenience, it is Thanksgiving any time you happen to have it; Christmas follows the birth of Christ, naturally there would be some kick about changing it, but if I want to celebrate Christmas like these people in Little America in July, it would be all right.

Q. What about the way the candidates are put on the ballot and types of the ballot used—how are they put on there—to make certain the election is carried out?

A. That is made to prevent fraud in elections. We don't have to follow those forms at all. There is one thing we do have to do under the statutes, it is a thing the Republican party and all others have to do, we have to present to the election officials properly accredited candidates to get them on the ballot. In order to do that it is better to have a uniform system in the primary; we follow a uniform system. I think we have changed the forms we make out several times. There is no cut and dried form we send out. My committee makes up those forms and sends them out. We have a different one—a different primary form from that used two years ago.

Q. Mr. Germany, you say the Democratic party is required to present—to certify candidates under the primary election law?

A. To certain other general election officials.

Q. That certificate certifies them, shows they have been elected according to primary election laws and in accordance with the laws of Texas?

A. In accordance with the laws of Texas.

Q. I believe you said that was a necessity or prerequisite to get them on the general election ballot?

A. It is necessary that they be certified in time the general election is fixed a certain date, it must be prior to that time in order that the general election officials will have time to print the ballot, get it out, that is the first essential; the second essential is that the general election officials must have the names—must be presented names in accordance with the statutes. We have to give a man's correct name if we know what it is that was nominated so that the man nominated will appear on the general election ballot, though it is only a matter of meeting the requirements of the general election law, beyond that I don't think the legislature has anything to do with holding our primary.

Q. So far as you know they always follow it?

A. They follow them pretty closely—they don't exactly, in fact, they could not, the average election official does not know enough for all of them to follow the same procedure,

The Court:

Were there some crosses of Mr. Germany?

Mr. Durham:

No, sir, no crosses. No cross examination of either witness.

We desire at this time to offer the deposition of Mr. C. A. Butcher.

115 C. A. BUTCHER was thereupon called as a witness on behalf of the plaintiff and, being first duly sworn, testified by deposition as follows:

Direct Examination.

By Mr. Durham:

Q. What are your initials, Mr. Butcher?

A. C. A.

Q. You live in Travis County?

A. Yes.

Q. How long, Mr. Butcher, have you resided in Travis County?

A. About—a little over two years.

Q. A little over two years?

A. That's right.

Q. Are you now connected with what is known as the Democratic party of Texas?

A. No.

Q. You do not hold any official capacity in it?

A. I have no official capacity—don't know what you call official capacity. I am called the secretary, but I have no power whatever.

Q. No power?

A. No vote, and I do not even voice the opinions of the members of the committee.

Q. You are serving now as secretary?

A. That's right.

Q. How long have you served in that capacity?

A. Well, I served the last administration and this one.

Q. For about three or three and a half years?

A. Approximately.

Q. Approximately three and a half years?

A. Yes.

Q. What are your duties as secretary?

A. I take notes of meetings and prepare minutes.

Q. You take notes. Do you keep a record of the minutes?

A. I keep a record of the minutes of the convention.

Q. You keep a record of the business of the convention?

A. Yes.

Q. Do you keep a record, or did you keep a record of the business of the last convention; that is, the gubernatorial convention held in September?

A. Yes.

Q. Then I believe you kept a record of the gubernatorial convention that was held two years prior to last September?

A. Which was that?

Q. In Beaumont.

A. I am sorry to say I do not have all those minutes; I have never been able to get them. That is the meeting of the executive committee.

Q. You just have the minutes of the executive committee?

A. I have just our administration.

Q. Your administration only?

A. Yes.

Q. Are there any permanent records that you know of of the Democratic party in Texas?

A. No, not that I know of.

Q. You did not take any of the minutes of that meeting?

A. No, not of that meeting.

Q. Or any of the previous meetings?

A. No.

Q. You say it is your duty to keep a record of the meetings and certify the names of the candidates or nominees to the Secretary of State, after they have been canvassed?

A. That's right.

Q. And each year since you have been serving as secretary, the Democratic party in Texas has held a primary election?

A. No, we have had only one primary since I have been secretary.

Q. That was in 1940?

A. Yes.

Q. Last year?

A. That is right.

Q. They held a primary election July 27, 1940?

A. That is right.

Q. And the run-off on August 24, 1940?

A. That is right.

Q. And those elections were held under the statutes, according to the statutes governing the primary elections in Texas?

A. That is right.

Q. And so far as you know the Democratic party has been conducting the primary elections in accordance with the primary laws and the general election laws of Texas?

A. Well, so far as I know, of course. To the best of my ability I tried to set them up that way.

Q. That was the practice of the party, to hold the elections under the statutes and in accordance with the statutes?

A. That is right.

Q. And that has been the general practice, Mr. Butcher, so far as you have been able to ascertain from the records, what few records you have?

A. So far as I know. Just like I told you, I don't know anything about what they did before, because I have not been active in that at all.

Q. Now, how is the business of the Democratic party operated with reference to leading up to the elections and holding the elections—that is, what procedure do you go through?

A. Well, how do you mean?

Q. To make myself clear—with reference to holding the primary elections, what procedure do you go through in order to hold that election? What does the officers of the Democratic party do, if anything, in connection with the preparation for holding the elections?

A. The candidates for office have to file with the committee.

Q. Then what, if anything, does the officials of the convention or the party do?

A. The officials of the convention, after the election?

Q. No, what do they do with reference to that application—the candidates, as I understand, file an application to become a candidate?

A. That is right.

Q. And that is filed with the secretary of the executive committee?

A. The chairman.

Q. The chairman; then what, if anything, does the members of the committee do?

A. The members of the committee at their meeting have prepared the ballots; the way the names are put—well, they don't do that, either. They prepare the ballot to a certain extent but the way the State is set up, I believe the counties have the right to arrange the names in each county, but we do certify these names to each county chairman in the State.

Q. And then they are placed on the ballot by the county executive committee?

A. That is right.

Q. And the order in which they draw the names?

A. That is right.

Q. After the election those who are nominated then are certified back to the secretary of the executive committee; is that right?

A. No, the results are reported back to the committee and we make a tabulation of the result, you see.

Q. And then those that receive the majority of the votes are certified to the election officials for their names to appear on the general ballots; is that right?

A. That is right.

Q. And the names of the candidates who are nominated in that election are certified to the Secretary of State; is that right?

A. That is right.

Q. Have you any set rules for running the affairs of the convention, Mr. Butcher?

A. Well, to a certain extent.

Q. To a certain extent?

A. Yes. The statutes set up certain regulations pertaining to the convention, that is, as to dates and so on, you know; the manner in which the location is selected for holding the convention.

Q. I believe you say you have no rules, save and except the laws of the State of Texas for governing the convention of the party?

A. No, the party is ruled, outside of the statutes, by the action of the party.

Q. You have no fixed rules?

A. No.

Q. The only rules and regulations that you have fixed for the government of the affairs of the party, is simply the laws of the State of Texas—the election laws of the State of Texas?

A. That is right.

Q. Now, at either of the conventions that you attended, Mr. Butcher, and especially the convention that was held in May, 1940, was there any action taken by the convention to bar negroes from participating in the primary election?

A. I never heard it mentioned at any convention I have attended.

Q. Not that you have attended?

A. Not that I have any recollection of, and I know there was no action taken.

Q. I think that is all, Mr. Butcher; thank you.

122 CHARLES E. KAMP was thereupon called as a witness on behalf of the defendants and, having been first duly sworn, testified as follows:

Direct Examination.

The Witness:

Your Honor, I want to prove up a lost instrument and I want to lay the predicate for the introduction of verbal testimony in lieu of presenting the instrument itself.

My name is Charles E. Kamp. I am a practicing attorney at the Bar of Harris County, Texas. I am at present chairman of the Harris County Democratic executive committee. I was first elected to that position by the members of the Democratic party at a county-wide election in 1938 and I was re-elected to that position in the same manner in the Democratic primary election of July, 1940. Previous to that I served as secretary of the Harris County Democratic executive committee for a period of four years, ending with the last day of December, 1932, being appointed to that position by the then chairman, Mr. John B. Lubbock. During that period of four years that I served

as secretary of the executive committee of Harris County. I was a practicing attorney at the Bar of Harris County, Texas, and defended some three or four or five of these suits brought by negroes in which they attempted to participate in Democratic primary affairs.

Because of the holding of the Supreme Court of the United States in the latter part of 1931 or the forepart of 1932, as I recall it, in a case styled Nixon versus Herndon with respect to the action of the State Democratic executive committee in promulgating a rule excluding the negroes from participation in Democratic primary elections, I made a recommendation to the Democratic party of Texas in convention assembled at Houston, Texas, on May 24, 1932, being a State convention, that a resolution be passed which might meet the test handed down by Mr. Justice Cardozo in that case. This State Democratic Convention met at the City Auditorium in Houston, Texas, being State-wide, and I was a member of the resolutions committee and I recommended the passage of a resolution, which was passed. The resolutions committee brought that resolution to the floor and moved its adoption. It was duly seconded. The motion was duly seconded. The question was put by the chairman of that convention and that motion was unanimously passed and adopted by that convention. I know the contents of that resolution because I helped frame it. After that resolution had been unanimously passed by that convention, I took that resolution because I had been acting as attorney in these cases and we of the convention believed that the negroes would file another suit testing that mandate of the people of Texas and take it to the Supreme Court of the United States to determine if it met the test. I took that resolution and took it to my office.

Following that, one more case of this nature was filed in Harris County, being styled Grovey versus Townsend, originating in the Justice of the Peace Court for Harris County, Texas, Precinct No. 1, being a suit for \$10.00 in

damages. A demurrer was sustained in that Court and an appeal was taken direct to the Supreme Court of the United States and the Supreme Court of the United States then passed on the question. The Supreme Court of the United States in its opinion reported in 295 U. S. 45, styled *Grove versus Townsend*, quotes that resolution in full.

I have looked for that resolution and I am unable to find it. The place where it would most likely be kept is in my files; more especially in one of the files in connection with one of these suits in which I have appeared in Court as counsel, and I am unable to find it and I don't know its whereabouts. I have discussed its loss with the secretary of the State Democratic executive committee, Mr. Butcher, in Austin, whose deposition was introduced this morning, and Mr. Butcher says he is unable to find it and knows nothing about it.

On January 1 of 1933 I left the private practice of law and became an assistant district attorney in this county, where I remained for five and a half years. The next case of this nature that arose following the adoption of that resolution was then handled by Mr. Nipp, an attorney in Houston, and I talked to Mr. Nipp about this resolution and Mr. Nipp doesn't have the original resolution and knows nothing about the original. I am unable to find it. I do know its contents. I helped frame it and I have lost it, and I would now like to introduce the contents of that resolution by parol.

Mr. Marshall:

If Your Honor please, at this point we wish to make an objection to the introduction of any parol testimony as to any purported resolution. First of all, I would like to go into the facts as so carefully set out by Mr. Kamp. In the first place, it seems to me that in any ordinary type of procedure for an organization, a resolution as passed would be some place in the records of the organization itself. I think that either the chairman of the executive committee

or the chairman of the convention or the secretary of the convention back there should have been questioned as to where that resolution is. I think there should be some connection. The only effort he has made to find the resolution within the State Democratic committee is in connection with Mr. Butcher, who has only been secretary for about two years.

The Court:

He tells though, counsel, that he took it away from the convention itself and brought it back to his office.

Mr. Marshall:

If Your Honor please, the taking away of a paper like that, it seems to me, is strictly out of the ordinary; a paper of that type; and there must be a copy of that paper. Otherwise, I don't see how this particular resolution, that is out in the air, carried away by Mr. Kamp, has any control over the party itself, and as I understand it, this is a resolution of the body that control the party.

The Court:

What position does Mr. Butcher now hold?

A. Your Honor, he is secretary of the State executive committee.

I should like to make an explanation to you in answer to counsel's statement about the records that are kept.

The Court:

Yes, sir.

A. I have attended many Democratic conventions, State and county, and so far as I know I have never seen a set of minutes kept by anyone in those conventions. I don't know who the secretary of that particular convention was. I don't know who the temporary chairman was, nor do I know who the permanent chairman was. They are

elected on the floor at that time. Mr. Butcher would have no reason to have this resolution; nor would Mr. Germany, because the State executive committee has no right, so far as I know, to a copy of those proceedings.

The Court:

Well, you do testify that the resolution as drawn by you was passed by the convention?

A. Unanimously passed without a dissenting vote.

The Court:

And then you took the resolution away?

A. I did, sir.

The Court:

And you propose to offer parol evidence to show what it was?

A. Yes, sir.

The Court:

I think you may do so. Objection overruled.

Mr. Marshall:

Exception.

The Witness:

May I dictate it to the Reporter?

The Court:

Yes, sir. What are you reading from?

A. I am reading from a paper of my own. It was drawn up first in the form of a stipulation. I had hoped we could stipulate, but we couldn't, and I have to refer to this, if it please the Court. I have also checked this back against the quoted resolution in the case of Grovey versus Townsend that I have just mentioned and I know that it is verbatim.

Mr. Marshall:

If it please the Court, I hate to continue to raise objections, but under a recent decision of the U. S. Supreme Court it is impossible to use the facts that have been decided in one case to decide an issue in another case, even though the facts revolve around the same instrument. Now we certainly object to any reading of any purported statement or any purported resolution when the only fact we have here is that Mr. Kamp is positive that he remembers exactly what it is, and then he comes back and he has read from some paper that we know absolutely nothing about.

The Court:

Objection overruled.

A. "Be it resolved that all white citizens of the State of Texas who are qualified to vote under the Constitution and laws of the State shall be eligible to membership in the Democratic party and, as such, entitled to participate in its deliberations."

That is the end of the resolution.

Now I would like to give this further testimony: That since the adoption of this resolution by the Democratic party in convention assembled on May 24, 1932, that resolution has never by any State Democratic convention in Texas been amended, abrogated, annuled, or avoided.

The Court:

You testify to that from personal knowledge?

A. I do, sir, yes, sir. I have kept in constant touch with Democratic affairs and conventions in Texas.

Mr. Marshall:

Are you through?

The Witness:

Not yet.

Mr. Marshall:

Oh. Excuse me.

A. I should like to state that the Democratic primary elections held in Harris County, Texas, on July 27, 1940, and August 24, 1940, were nominating elections and the candidates nominated by the Democratic party thereat became candidates for election to the respective offices for which they sought the nomination at a general election held in Harris County, Texas, on November 5, 1940. At the general election on November 5, 1940, neither the plaintiff in this case nor any other colored person or negro was denied the right to vote.

The Democratic party of Texas is a political party and the Harris County Democratic party is a subdivision of that State-wide political party. Neither the County Judge nor the Commissioners Court of Harris County, Texas, exercised any supervision over the Democratic primary elections of July and August of 1940, or any other primary elections that I know anything about. The instructions that the presiding judges, assistant judges, clerks and supervisors receive come either from me as chairman of the Harris County Democratic executive committee or the regulations are promulgated by the executive committee itself at a meeting it holds of its membership approximately a month before the first primary election of every even year. By "even year" I mean in 1938, 1940, and so forth.

That is all.

The Court:

You may cross examine.

Cross Examination.

By Mr. Marshall:

Q. Have you attended every convention of the Democratic party?

A. Every one but the last one.

Q. When was the last one held?

A. In 1940 in Mineral Wells.

Q. What month?

A. May. It is always in May.

Q. You didn't attend the one in May?

A. I did not.

Q. Well then, as a matter of fact, you can't testify of your own personal knowledge that no action at all has been taken on that 1932 resolution since that time, can you?

A. I wasn't there, but I keep up with those affairs and I know it wasn't.

Q. But of your own personal knowledge, since you were not there, you do not know what action, if any, might have been taken on that resolution?

A. I wasn't on the convention floor nor in the convention city.

The Court:

What did Mr. Butcher and Mr. Germany say about that in their depositions? They just testified that there had been no resolution passed, didn't they?

Mr. Marshall:

During their time and that they had no records and that they weren't quite sure what had happened.

The Court:

Well, they testified that in so far as they knew no resolution of any kind had been passed.

Mr. Marshall:

Had ever been passed.

The Court:

Either rescinding the 1932 resolution or adopting a new one.

Mr. Marshall:

The only question we asked was whether or not while they were in office any action had been taken by the Democratic party to bar negroes from voting in the primaries.

The Court:

And they answered in the negative?

Mr. Marshall:

Yes, sir.

The Court:

That would mean, wouldn't it, that this 1932 resolution was not disturbed?

Mr. Marshall:

I don't know, sir, because in their deposition they say they have no minutes and they are not sure. Mr. Germany says, and I would like to read his language, that he was quite sure what had happened.

The Court:

Well, you stated it this morning. Go ahead.

(By Mr. Marshall):

Q. In connection with the other conventions you have attended since 1932, have you been on the floor of the convention during the entire time the convention was in session?

A. Been on the floor of the convention when all of its business was being acted on.

Q. During each convention?

A. During each convention, that is right.

Q. Now do you have any records at all in your office showing any action taken by any of the conventions you have attended?

A. Actions concerning what?

Q. Anything.

A. I would have no reason to, no.

Q. Now, this purported resolution that was passed in 1932, have you made any effort to find a copy of it?

A. I have gone through my papers. When you speak of a copy of it, my answer is no. I simply find a continued series of this resolution that I have read into the record among the papers in cases that I have handled.

Q. I mean have you made any effort to find a copy of it in anyone else's possession?

A. There was no copy of that resolution. That resolution was drawn up with some other resolutions and presented to the floor of the convention and passed.

Q. And passed and you just carried it away with you?

A. That is right.

Q. I think you testified before that you didn't know who was secretary of that convention and who was the permanent chairman?

A. I do not.

Q. The 1932 convention?

A. I do not.

Q. Have you made any effort to find out?

A. I don't know where to go. I don't know what source to go to to find out. I couldn't tell you who the chairman of these conventions has been. They are nominated and elected from the floor. They serve and then the convention is dissolved and that is all there is to it.

Q. Well then, when the convention dies, the duties of the permanent officers all die with the convention?

A. That is correct. Die, right there.

Q. Well now, speaking of the State Democratic party in Texas, at the present time between two conventions what is the Democratic party in Texas now?

A. The Democratic party between two conventions is composed of a group of individuals who have particular or peculiar political ideals and beliefs.

Q. Just scattered around in the State?

A. Oh, no. They are very well organized.

Q. Well, how are they organized? You said the officers all die with the convention.

A. I don't understand. Would you mind connecting those two questions?

Q. I am speaking of the State party itself.

A. All right. Ask your question.

Q. Now the State party itself, as I understand, when the convention stops, all of the State officers of the convention stops?

A. That is right.

Q. Now is there any other group of officers, with the exception of the State executive committee, existing in the Democratic party in Texas at the present time?

A. There is not.

Q. What is there of the State Democratic party between conventions with the exception of the State executive committee?

A. I am sorry. I don't understand your question.

Q. There is no chairman, is there?

A. There is a State Democratic chairman.

Q. He is the chairman of the executive committee, is he not?

A. That is right. He is chairman of the State executive committee.

Q. But there is no chairman of the party itself?

A. That is right. The moment that convention closes or adjourns the officers of that convention cease to function. They have nothing to do.

The Court:

Might not the chairman of the executive committee be the chairman of the party? Not of the convention, but of the party?

A. Judge, it would be hard for me to answer that. I don't know. If he would be chairman of the party, then I

would probably be chairman of the party in Harris County, but I have never considered myself as such. I have considered myself an administrative party official, of the business and of it, but not of the party itself. I have never considered myself as such. I have always considered that I had a particular job to do, but I do not consider myself as head of the Democratic party in Harris County.

The Court:

Well, the party, after the convention adjourns, and the party's general managers roll up a pretty good majority at the November elections, do they not?

A. Yes, sir, they do right well.

Mr. Marshall:

If you will give me just a moment, Your Honor, I can find in here where Mr. Germany explains what his duties are between conventions, and he denies that he is chairman of the party. He insists he is chairman of the executive committee with practically no power at all.

The Court:

Well, if it is in there, it is already in evidence.

Mr. Marshall:

Do you want me to read it, sir?

The Court:

No, sir. I was just asking out of curiosity. I don't know much about it.

(By Mr. Marshall):

Q. Now carrying the point further, when the one convention dies and the other convention becomes organized, does it not set up its own rules and regulations?

A. Each convention sets up its own rules and regulations.

Q. And is it not completely independent of any prior conventions?

A. In what respect?

Q. Well, is there anything that prevents it from doing what it might want to do? Are there any set rules and regulations in writing any place to control it?

A. In respect to what?

Q. In respect to the transaction of business. Let's start back at the beginning. There are no set rules and regulations in writing governing the convention?

A. That is correct.

Q. There is no constitution?

A. That is correct.

Q. No by-laws?

A. That is right.

Q. When one convention is assembled, is there anything in any prior convention that is absolutely binding on the existing convention?

A. Oh, yes, I think so.

Q. Is there anything that any prior convention has done that the existing convention can't rescind?

A. Oh, I think it could rescind it if it wanted to, but until it is rescinded, I think the act of the prior convention is a continuing act and is in effect.

Q. But there is nothing to prevent this existing convention from taking any action it sees fit?

A. Oh, no.

The Court:

In other words, the convention in 1934 could have rescinded this resolution of 1932 had it seen fit to do so? Is that what you are telling us?

A. Yes, sir.

The Court:

And you think until it is so rescinded, either in 1934, 1936 or 1940, that it is still the law of the Democratic party in Texas?

A. That is right, sir.

(By Mr. Marshall):

Q. Are there any other qualifications set out by the Democratic party for voting in the primary elections that you know of?

A. That is the only one that I know anything about.

Mr. Marshall:

I think that is all.

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APPEAL BOND.

Filed June 6, 1942.

(Title Omitted.)

Whereas, on May 30, 1942, the defendants S. E. Allwright and James J. Liuzza, received a judgment in the above entitled cause, from which judgment plaintiff, Lonnie E. Smith, desires to take an appeal to the Circuit Court of Appeals for the Fifth Circuit:

Now, Therefore, Know All Men By These Presents: That we, Lonnie, E. Smith, as principal, and A. A. Lucas and Julius White, as sureties, acknowledge ourselves bound and obligated in the sum of Two Hundred and Fifty (\$250.00) Dollars; conditioned that the said Lonnie E. Smith will pay all costs in said cause if his appeal to the United States Circuit Court of Appeals for the Fifth Circuit is dismissed or said judgment is affirmed by said Court or said costs as the Appellate Court may award if the judgment is modified.

Witness the execution hereof this 6th day of June, 1942.

LONNIE E. SMITH,

(Lonnie E. Smith)

Principal.

A. A. LUCAS,

(A. A. Lucas)

JULIUS WHITE,

(Julius White)

Sureties.

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NOTICE OF APPEAL.

Filed June 6, 1942.

In the District Court of the United States for the Southern
District of Texas, Houston Division.

Lonnie E. Smith, Plaintiff,

vs.

Civil Docket No. 645.

S. E. Allwright and James J. Liuzza, Election Judge and
Associate Election Judge, 48th Precinct of Harris
County, Texas, Defendants.

Notice is hereby given that Lonnie E. Smith, plaintiff
in the above cause, appeals to the Circuit Court of Appeals
of the Fifth Circuit from the final judgment entered in
this action on May 30, 1942.

Dated this 5th day of June, 1942.

THURGOOD MARSHALL,
(Thurgood Marshall)W. J. DURHAM,
(W. J. Durham)H. S. DAVIS, JR.,
(H. S. Davis, Jr.)Attorneys for Plaintiff-
Appellant.409½ Milam Street,
Houston, Texas.

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CLERK'S CERTIFICATE.

United States of America,
Southern District of Texas.

I, HAL V. WATTS, Clerk of the District Court of the United States, for the Southern District of Texas, in the Fifth Circuit and District aforesaid, do hereby certify the foregoing to be a true and correct copy of the record and all proceedings had in the case, as called for in the Designation for contents of record on Pages 1 and 2 of this Transcript, in Cause No. 645 on the Civil Action Docket of said Court at Houston, entitled Lonnie E. Smith, Suing on Behalf of Himself and on Behalf of Other Qualified Negro Voters in the State of Texas, versus W. D. Miller, County Clerk of Harris County, Texas, and S. E. Allwright, Election Judge, and James J. Liuzza, Associate Election Judge, and James J. Liuzza, Associate Election Judge, 48th Precinct of Harris Court, Texas, as the same now appears on file and of record in my office.

To Certify Which, Witness my hand and the Seal of said Court at Houston, in said District, this the 7th day of July, A. D. 1942.

(Seal)

HAL V. WATTS,
Clerk, United States District
Court, Southern District of
Texas,
By S. F. CUNNINGHAM,
Deputy.



[fol. 150] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of November 10, 1942

No. 10382

LONNIE E. SMITH,

versus

S. E. ALLWRIGHT, ELECTION JUDGE, and JAMES J. LIUZZA, Associate Election Judge, 48th Precinct of Harris County, Texas

On this day this cause was called, and after argument by Thurgood Marshall, Esq., for appellant, and Glenn A. Perry, Esq., for appellees, was submitted to the Court.

[fol. 151] OPINION OF THE COURT—Filed November 30, 1942

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10382

LONNIE E. SMITH, Appellant,

versus

S. E. ALLWRIGHT, ELECTION JUDGE, and JAMES J. LIUZZA, Associate Election Judge, 48th Precinct of Harris County, Texas, Appellees

Appeal from the District Court of the United States for the Southern District of Texas

November 30, 1942

Before Sibley, Hutcheson, and Holmes, Circuit Judges

BY THE COURT:

The appellant Lonnie E. Smith sued the appellees because they denied him the privilege of voting at a Democratic

Primary and a run-off election in Texas held July 27, 1940, and Aug. 24, 1940, for the choice of candidates for United States Senator and Congressmen, for Governor of the State, and other State officers, asking a declaration of his right to vote, and for \$5,000 damages. The facts are stipulated and include these: Appellant is a native citizen qualified to vote under the State laws for the officers above mentioned, but is a colored person. He believes in Democratic principles and has never voted for the candidates of any other party. He was not allowed to vote in the primary because of his color, the State Democratic Party in convention assembled having in 1932 resolved that only white citizens of the State qualified to vote shall be eligible to membership and to participate in the party's deliberations. With two exceptions, Democratic nominees for Congress, Senate and Governor have been elected in Texas since 1859. The principal question is whether the primary, held under the provisions of the State statutes, is an election in which this voter has a right to vote by virtue of the provisions relating to voters of the Federal and State Constitutions, or is a mere party procedure, participation in which may be controlled by the party holding it. The trial court thought *Grovey vs. Townsend*, 295 U. S. 45, controlling and dismissed the petition. This appeal followed.

The Texas statutes regulating party primaries which were considered in *Grovey vs. Townsend* are still in force. They were held not to render the primary an election in the constitutional sense. There is no substantial difference between that case and this. It is argued that different principles were announced by the Supreme Court in *United States vs. Classic*, 313 U. S. 301. The latter was a criminal case from Louisiana, and did not involve the Texas statutes. It differs in many points from this case. The opinion of the court in that case did not overrule or even mention *Grovey vs. Townsend*. We may not overrule it. On its authority the judgment is Affirmed.

A True copy:

Teste:

— — —, Clerk of the United States Circuit Court
of Appeals for the Fifth Circuit.

[fol. 153]

JUDGMENT

Extract from the Minutes of November 30, 1942

No. 10382

LONNIE E. SMITH,

versus

S. E. ALLWRIGHT, Election Judge, and JAMES J. LIUZZA,
Associate Election Judge, 48th Precinct of Harris County,
Texas

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Texas, and was argued by counsel;.

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellant, Lonnie E. Smith, and the sureties on the appeal bond herein, A. A. Lucas and Julius White, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fols. 154-159] PETITION FOR REHEARING—Filed December 19, 1942

IN THE

United States Circuit Court of Appeals

FOR THE FIFTH CIRCUIT

No. 10382

LONNIE E. SMITH,

Appellant,

vs.

S. E. ALLWRIGHT, Election Judge, and JAMES J. LIUZZA, Associate Election Judge, 48th Precinct of Harris County, Texas,

Appellees.

PETITION FOR REHEARING

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

Now comes the Appellant, Lonnie E. Smith within 21 days after the filing of the opinion in the above entitled cause on November 30, 1942, and petitions the Court to grant Appellant a rehearing thereof on the grounds that

questions decisive of the case and fully submitted by Counsel in brief and argument have been overlooked by the Court and that the decision violates Article I and Amendments 14, 15, and 17 of the United States Constitution and is in conflict with the controlling decision of the United States Supreme Court.

I.

The opinion in this case states:

"The Texas statutes regulating party primaries which were considered in *Grovey v. Townsend* are still in force. They were held not to render the primary an election in the constitutional sense. There is no substantial difference between that case and this."

The instant case is different from the case of *Grovey v. Townsend*. *Grovey v. Townsend* was decided by the United States Supreme Court upon a skeleton record which included only the pleadings in the case and did not include any evidence at all. In the instant case there is not only a question of pleadings, but also full stipulations of facts and oral testimony which gives for the first time a full and complete picture of the question of the operation of the Democratic primary elections in Texas. It appears from the record in this case that the Democratic primary in Texas is not limited to Democrats, but is open to all white qualified electors regardless of the party to which they might belong (R. 81, 106). The record of the instant case also shows that the Democratic Party in Texas is a voluntary association of individuals without any rules governing membership and without any defined membership in fact (R. 119). There are no constitution, by-laws, nor fixed

rules for the Democratic Party (R. 133, 146). There are no fixed rules for the "government of the affairs of the party" other than the election laws of the State of Texas (R. 133-134). There are no rules for the holding of primary elections other than the election laws of Texas (R. 133). These and many other facts clearly set out in the record of the instant case did not appear in the record in the case of *Grovey v. Townsend*.

II.

The decision in the instant case is in conflict with the decision in the case of the *U. S. v. Classic*, 313 U. S. 301. The *ratio decidendi* in the *Classic* case is that:

" * * * Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary, is likewise included in the right protected by Article 1 and 2. And this right of participation is protected just as is the right to vote at the election, where the primary is by law, made an integral part of the election machinery, whether the voter exercises his right in a party primary which invariably, sometimes never determines the ultimate choice of the representative. Here, *even apart from* the circumstance that the Louisiana primary is made by law an * * * (319)

* * * integral part of the procedure of choice, the right to choose by a representative is in fact controlled by the primary because, as is alleged in the indictment, the choice of candidates at the Democratic primary determines the choice of the elected representative. Moreover, we cannot close our eyes to the fact already mentioned that the practical in-

fluence of the choice of candidates at the primary may be so great as to affect profoundly the choice at the general election even though there is no effective legal prohibition upon the rejection at the election of the choice made at the primary and may thus operate to deprive the voter of his constitutional right of choice. This was noted and extensively commented upon by the concurring Justices in *Newberry v. United States*, *supra* (256 U. S. 263-269, 287, 65 L. Ed. 923-926, 932, 933, 41 S. Ct. 469)." (Italics ours.) (313 U. S. 301, 318-319)

It is apparent from the above that the two bases for decision in the *Classic* case are alternatives in the disjunctive rather than a single basis as the opinion in the present case assumes. Although this Court in its per curiam opinion mentions the question of whether or not the statutes of Texas make the primary elections an integral part of the election machinery, the alternative ground for relief in the *Classic* case is ignored; namely, the circumstance that "in fact the primary effectively controls the choice." In the instant case it was admitted by appellees, and remains unchallenged in the record that in Texas the Democratic primary election is the only place where a qualified elector can make an effective choice of candidates.

It should also be noted that the *Grovey* case was decided solely on whether or not the Democratic primary of Texas violated the Fourteenth Amendment. Neither the record nor the decision in that case made any mention of Article I of the United States Constitution. The jurisdiction of the instant case is based not only on the Fourteenth and Fifteenth Amendments but also on Article I and Amendment Seventeen of the United States Constitution. The precedent of the United States controlling these points is the *Classic* case and not the *Grovey* case.

III.

Further grounds for urging a rehearing and reconsideration of the decision that the instant case has been predetermined by the decision of *Grovey v. Townsend*, is to be found in the language of Mr. Justice BRANDEIS in his dissenting opinion in the case of *Burnet v. Coronado Oil & Gas Co.*

"The doctrine of *res judicata* demands that a decision made by the higher court, whether it be a determination of a fact or a declaration of a rule of law, shall be accepted as a final disposition of the particular controversy, even if confessedly wrong. But the decision of the Court, if, in essence, merely the determination of fact, is not entitled, in later controversies between other parties, accorded to the decision of a proposition purely of law. For not only may the decision of the fact have been rendered upon an inadequate presentation of then existing conditions, but the conditions may have changed meanwhile. * * * (285 U. S. 393, 412 [1932])

CONCLUSION

A comparison of the record in the instant case with the record in the case of *Grovey v. Townsend* demonstrates clearly that the two cases are different on a factual basis. As to the law involved, a comparison of the statutes and record in the instant case with the case of *U. S. v. Classic* shows clearly that this question is within the rule in the *Classic* case, so that as to facts, this case is not prejudged by the case of *Grovey v. Townsend* and as to the law, the instant case is bound by the rule of the case of the *U. S. v. Classic*.

We, therefore, respectively urge that a rehearing be granted the appellant in this case.

Respectfully submitted,

THURGOOD MARSHALL,
New York.

W. J. DURHAM,
Sherman, Texas,
Attorneys for Appellant.

WILLIAM H. HASTIE,
Washington, D. C.

W. ROBERT MING, JR.,
Chicago, Ill.

GEORGE M. JOHNSON,
San Francisco, Calif.

LEON A. RANSOM,
Columbus, Ohio.

CARTER WESLEY,
H. S. DAVIS, JR.,
Houston, Texas,
Of Counsel.

[fol. 160]

ORDER DENYING REHEARING

Extract from the Minutes of January 21, 1943.

No. 10382

LONNIE E. SMITH,

versus

S. E. ALLWRIGHT, Election Judge, and JAMES J. LIUZZA,
Associate Election Judge, 48th Precinct of Harris County,
Texas

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 161] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 162] **SUPREME COURT OF THE UNITED STATES**

ORDER ALLOWING CERTIORARI—Filed June 7, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(7154)